THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 7, NO. 3. MARCH, 1943

CONVEYANCER'S NOTEBOOK.

Planning.—The passing of the Ministry of Town and Country Planning Bill is the first instalment of the now definite determination of the Government for central control of a planned countryside. The Act provides that the Minister is to be " charged with the duty of securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales ". As from a date specified by an Order in Council the Minister is to take over the duties of the Minister of Works under the Town and Country Planning Act, 1932. In fact the Minister will largely supersede the Minister of Health, who was the originally constituted authority under the 1932 Act.

From the point of view of the conveyancer it is difficult to decide at this stage whether the national policy " with respect to the use " or the national policy " with respect to the development " of land may be the more important. If the recommendations and/or suggestions contained in the Scott and Uthwatt Reports are adopted in any substantial measure there can be little doubt that the " development " provisions will be both more important and more drastic. Combined with the present tendency towards " statification ", if we may coin the word, of agricultural land during the present emergency, as exemplified by the Defence Regulations referred to in an ensuing paragraph, the prospect of planned development leaves the present position of the landowner and prospective purchasers of land very obscure. If this checks land speculation during the war it is probably no bad thing and indeed in any " planned " economy the question of speculation in land values, which with the destruction of many houses and the decline in building and development during the last few years would seem inevitable, must take an early and prominent place. If, indeed, all development is to take place under a scheme based on 1939 values, as is envisaged by the Uthwatt Report, this would seem to operate as an immediate deterrent so far as undeveloped land is concerned. Consequently, the earlier the Government announce their policy in this respect the better.

Having regard to the recent decision that rent for the purposes of the Rent, etc., Act, 1939, is the rent at which the property was let though a hundred years ago, if this decision stands, and the Act, as is likely, is continued, the position of tenants will *on the whole* be fairly safeguarded against speculative landlords. But none of these matters affect speculation in houses sold with vacant possession, which was so marked a result of the post-war housing problem after the last war and unless checked in good time may be even more marked after this war with the wholesale destruction of houses that has come in its train. Already and with the comparatively static conditions of the war period there is a noticeable, sharp rise in prices of houses, at least in some areas. Many families have been rendered homeless and many of these are not immediately affected because of war evacuation. With the return of more normal conditions the present tendency is likely to receive a sharp impetus. Whether or not this problem belongs peculiarly to the province of the new Minister it is difficult to say on the somewhat vague wording of the Act, but in the interests of present owners of property and future purchasers it should undoubtedly be exercising the minds of some Government department, and equally as early as possible a statement of policy should be declared.

It is also worthy of notice that the Act provides for the establishment of "any Commission for the purpose of exercising under the direction of the Minister functions in relation to the use and development of land in England and Wales or any area therein". Such commissions may be established by Order in Council which must first be presented in draft to Parliament. Such a commission, if incorporated, may be enabled to hold land without a licence in mortmain notwithstanding that the land may not be held on behalf of the Crown. There is nothing to indicate what functions are contemplated for any such commission. That such commissions are envisaged at all, however, is itself indicative of a form of control much more drastic than hitherto experienced. Why this legislation should be so much bound up with legislation by Order in Council it is not easy to understand, but presumably it is due to the fact that the authority is to be given before the plan is laid. This was, in the opinion of the writer, a vice of the existing system of Town and Country Planning that need not have been perpetuated. Parliament does not meet so infrequently and plans are not hatched and executed with a rapidity that demands authority in advance.

It cannot be denied that both land and houses, whether in peace or war, play such a vital part in the essential life of the community that they are properly the concern of any government. The methods by which the community can most benefit by the control and use of land and houses are, however, much more controversial issues. Psychologically, Englishmen can be divided into two classes for the purpose of any discussion on this topic. Apart from flat-dwellers, an ever-growing class, there is a mass of people, probably more urban than rural but not confined to urban areas, to whom their house and land is merely a local habitation and a name. When it has served their purpose they leave it with no regret and ask primarily, if not only, to be comfortable in their

stay. The background and outlook of their lives is little affected by the nature of their dwelling provided that it includes a certain standard of amenities, which of course varies with circumstances. The other class regards the land not as a resting place but as part of their lives having responsibilities as well as rights. In the narrow legal view it is for this class that the historic system of land law was framed and has survived and strict settlements remain. It is not an accident that trusts for sale of land were called "traders' settlements", since traders have been looked upon traditionally as birds of passage having no roots in the soil. Perhaps, in the larger view, we may say that it is due to this class that England is the land it is, the "homely" land. Not by any means all this class are large landowners, perhaps not all large landowners are of this class, and indeed many are not landowners in the technical sense at all. But probably all wish to be landowners, though the "land" is little more than an allotment, and it is probable also that this was the reason why the old election cry of "three acres and a cow" met with such a deep response in the feeling of the country.

It is to be hoped that in any "reforms" in the law, whether they be purely technical, such as the Property legislation, or they take the form of central planning, this fundamental aspect of English life should not be forgotten. It exposes the fallacy that land can be treated as a pound of butter or indeed as stocks and shares in a limited company. It is difficult to think of any response to the "call" of dividends (save perhaps in the mind of a usurer) similar to the response to the call of the land in the minds of many Englishmen. Technical changes in the form of conveyancing, such as registration of title, do not affect this aspect of the question. Whether he derives title from an entry on the Register or from a document deposited in the bank can make no real difference to the landholder. On the other hand, this view does not apply, in our opinion, to the argument in favour of trusts for sale. Under a strict settlement the landowner is the estate owner, that is the legal owner of the property. Under a trust for sale the person intended for the real owner is not; at best he has the powers of management and leasing delegated in writing by the trustees for sale, who may be some remote functionary such as the Public Trustee. The family bound to the soil do not own; the land is treated as though it was a mere commodity of commerce which, if some of the best features of English life are to be retained, it is not and should not be.

Whether a body of civil servants living in or about Whitehall and the product of the modern system of education for the middle class is likely to have much sympathy for this feeling for the land of their fathers remains to be seen. A national policy will certainly call for a breadth of outlook and appreciation of the other fellow's point of view not always noticeable in the activities of Government departments. But at this stage what we would say is that the Minister would do much to render his plans satisfactory if he published them at the earliest date and submitted them to the fire of criticism well in advance before he was prepared to make a firm and unalterable decision which is to be pushed through Parliament with the full weight of Government support. Factious opposition he will

no doubt have to meet in any case, but informed and constructive criticism in the early stages may make good plans better. Plans which will have the effect of transforming all Englishmen into a class equivalent to the flat-dwellers for whom their place of residence is a resting place rather than a home for them, their children and their children's children may have consequences on the future history of Englishmen which it is difficult to calculate. To the body of informed and constructive criticism conveyancers should be able to contribute in no small measure. Whether in drawing settlements and wills or in preparing leases, particularly of agricultural land, conveyancers are constantly in touch with the uses to which land can be put, the rights that may be enjoyed over it in their rather multitudinous character, and that attachment to the soil of which we have spoken. In some ways conveyancers have a more comprehensive view of the situation than any other class. They see it from every angle except perhaps that of the landless man who looks upon land as a form of wealth just equivalent to money and having no more heart or soul and who, therefore, tends to think that he should be able to use it as a banknote. We hope, therefore, that this informed body of opinion may have the opportunity of making its impact felt before the nicely balanced plans of the Administrator are presented as a *fait accompli*.

The following has been issued by the Ministry of Agriculture:—

"*Agricultural holdings—notices to quit agricultural land.*—By a Defence Regulation (No. 2561) made on December 16, 1942, it is provided that where the tenant of an agricultural holding receives from, or gives to, his landlord notice to terminate the tenancy of the holding, or any part of the holding, the landlord must, within one month of giving or receiving the notice, inform the County War Agricultural Executive Committee for the area in which the land to which the notice relates or any part thereof is situate, of the giving or receipt of the notice.

This regulation applies in all cases whether the land has been purchased since the outbreak of war or not, and has been made for the purpose of enabling the Executive Committees to keep their Farm Survey up-to-date, and to ensure that proper arrangements are made for the farming of the land at the expiration of the notice to quit."

This notice is consequent upon a further amendment of regulation 62 of the Defence (General) Regulations. The amendment presents one immediate difficulty because it does not appear to deal with cases in which the notice to quit was given before the date of the new regulation and no doubt there are a number of such notices to quit current. The new regulation is regulation 62, paragraph 4B. Paragraph 4A makes void a notice to quit given by either a tenant or a landlord without the consent of the Minister obtained prior to giving the notice or before the end of 1941, *wherever* the land is subject to a contract for sale or has been sold subsequently to September 3, 1939. Apparently the Ministry has now thought it wise to ensure that it is informed of all notices to quit whether or not the land has been sold since the beginning of the

war or is subject to a contract for sale. This may in part be due to the fact that regulation 62, paragraph 4A, does not seem to cover the case where a notice to quit is first given and then after possession is obtained by the landlord he sells the property with vacant possession.

It must, however, be borne in mind that under regulation 62, paragraph 1 (as amended), the Minister has amazingly wide powers conferred upon him. In relation to any agricultural land (which means a holding within the Agricultural Holdings Act, 1923) the Minister may give such directions with respect to the cultivation, management or use of that land as he thinks necessary or expedient for the purpose of increasing or maintaining the production of articles essential to the life of the community. These directions may be general, but they may be by notice relating to the agricultural land specified therein. This last provision clearly envisages interference in the case of individual holdings such as that conducted under the Ploughing Up Orders. Of this form of control obviously control of tenants, which indirectly means control of tenancies, as is provided for under other paragraphs of this regulation, will form part of the present wartime policy. In fact it provides something like the control of tenancies of urban holdings under the Rent Restriction Acts but substitutes a more discretionary control vested in the Ministry designed for somewhat different purposes.

(See Precedent No. 19, III, p. 313, *post*.)

These Regulations and Orders afford, or should afford, conveyancers considerable thought where they are concerned with transactions, particularly by way of sale, of any land. It will be recalled that in *Cook* v. *Taylor*, [1942] Ch. 349 (noted *ante*, p. 40) a sale with vacant possession was discharged by reason of a requisitioning notice served and executed after the date of contract but prior to completion. No doubt this particular difficulty is normally met by the terms of the contract at the present day, but clearly other less well-known powers of interference with the land, such as that referred to in our last paragraph, do call for attention. As an illustration of this we may draw attention to a matter which is often of considerable importance in rural areas, namely, water supply. Early this year (S. R. & O., 1942/502) powers were conferred on water undertakers to secure the use of the water in any well, river, stream, lake or pond: this Order was regulation 54AB of the Defence (General) Regulations. The power was limited by two factors, first there must either be consent or authorisation of the Minister of Health and secondly and very importantly it was limited to circumstances arising from any actual or apprehended attack by the enemy. Later (S. R. & O., 1942/961) a much wider authority was conferred upon " a competent authority " (a miscellaneous collection of Government departments) " for any purpose connected with the defence of the realm, the prosecution of the war, the securing of the public safety, or the maintenance of supplies and services essential to the

life of the community" to take water from any source of supply, whether artificial or natural: regulation 50A. This regulation is also subject to certain safeguards, such as the consent of the Minister of Health, and provides for compensation to be paid, though in assessing compensation, if any, no appreciation of values ascribable to the war may be taken into account.

A purchaser, who between contract and completion finds his supply of water seriously interfered with, together, no doubt, with concomitant interference with part of his property, may easily find objection to completing his purchase. Such an attitude may be neither very laudable nor patriotic since the same fate obviously is liable to befall at any time, but conveyancers should be forearmed against such objection. Consequently it becomes highly desirable to frame in a contract an omnibus clause including all possible forms of interference with the property under Emergency Regulations prior to completion.

Re Morgan (1942), 111 L. J. Ch. 230 (noted *ante*, p. 43) has been overruled by the House of Lords upon the general principle, according to newspaper reports, that money has not and should not have a primary technical meaning in the construction of wills. When noticing the case in the Court of Appeal we observed that the learned Master of the Rolls had called attention to the anomalous character of the rule they were enforcing and to the fact that it was in the power of the House of Lords to overrule it. At the time of going to press no full report is in our hands, so that discussion of the exact legal proposition now affecting gifts of "money" must be left to a later issue, but there is no doubt that the decision will prevent many cases of hardship in the future where, but for the rule as applied by the Court of Appeal, gifts of money would have embraced a much larger share of the testator's property. Nevertheless, experience of these rather frequent cases in home-made wills shows that the decision is not all gain. "Money" is used in such a variety of different senses that we suspect the flow of cases through the Courts for the protection of personal representatives responsible for administration is likely to be increased rather than diminished. Sometimes a testator will mean money in the sense of all his property whatsoever, sometimes such matters as deposit accounts and money in a much narrower meaning, or again investments as opposed to physical property. The line to be drawn will, it is thought, be fine in a number of cases and every will will depend for its construction not only on its own terms but the circumstances of the testator surrounding its execution. The one thing which at the moment seems certain is that the word "money" should never be used in a professionally drawn will without some exact definition of its content. There is nothing new in saying this: in *Key & Elphinstone*, Vol. II (14th ed.), p. 82, n. (*o*), it is said: "Owing to the ambiguity of such words as 'money' or 'cash' a bequest of such a kind is unsatisfactory." But a bequest of money "in my house at my death" is sometimes regarded by testators

as at least very convenient. Money here has been held to include "Post Office money orders": *Re Windsor*, 108 L. T. 947; but not National Certificates: *Re Hodgson*, [1936] Ch. 203. "Current coin of the realm" may sound pedantic but it might provide a more definite alternative if that alone is intended to pass. In the meantime a gift of "money" will have to be scrutinised by practitioners called upon to advise personal representatives with an added care, if that were possible.

THE ORIGIN AND LOGICAL IMPLICATIONS OF THE *EJUSDEM GENERIS* RULE.

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The origin of the *ejusdem generis* rule seems to be wrapped in some obscurity. It is not, I am informed, found in Roman law, nor yet in the leading systems of the Continent. Thus it seems to be a purely native development. From its "logical" flavour it might be expected that it originated in the Middle Ages, the heyday of formal logic. This, however, does not seem to be so. Or at any rate, if some such rule was known in the Middle Ages, it was not known under the name of *ejusdem generis*, and the logical implications of the reference to genus were absent.

The medieval authorities can be considered quite briefly. In a case of 1303 (*a*) counsel, in argument, seems to have suggested that general words following specific words were quite inoperative: "those words 'other things' [in a submission to arbitration] refer only to the things previously specified". Taken literally this would nullify the general words. Another counsel in the same case came nearer to the modern rule. He referred by way of illustration to the concluding words of the action of trespass to the person, "*et alia enormia ei intulit*", and suggested that they were confined "to similar things depending on the main thing previously specified". This particular application of the rule would have been reasonable enough, for obviously a plaintiff was expected in framing his writ to state his cause of action with reasonable particularity, and not to leave it shrouded behind general phrases. The only other reference to the principle that I have seen in the Year Books is in a case of 1338 (*b*), where a remark of counsel suggests that the concluding general words of statutes were read in the light of earlier particular words. Again the technical phrase "*ejusdem generis*" is not used. I do not claim to have made an exhaustive search in the Year Books, but the phrase *ejusdem generis* is not indexed in Ashe's *Tables* and I cannot find it in the *Abridgements*. It is not indexed even in Viner's *Abridgement*. One might have expected to find it in that rich mine of Latin tags, the writings of Coke, but it does not appear to be there. At least, I have never seen it there, and it is not in the index to Coke's

(*a*) Y.B. 30 & 31 Edw. 1, R. S. 491.
(*b*) Y.B. 12 & 13 Edw. 3, R. S. cxix, 51.

maxims made by Ashe under the title *Fasciculus Florum*. It is not in Finch's *Law* (1627), nor in Dodderidge's *English Lawyer* (1631), nor in Sheppard's *Touchstone* (1641) (here the nearest rule turns out to be pretty well its opposite: "That that which is generally spoken, be generally understood"—p. 88). It is not in the books of maxims by Bacon (1630), Noy (1641), Hawke (1657), and Wingate (1658). Bacon has a maxim (Reg. 10) that "*verba generalia restringuntur ad habilitatem rei vel personæ*", but none of the illustrations he gives are illustrations of the *ejusdem generis* rule. The next book of maxims is the anonymous *Grounds and Rudiments of Law and Equity* (1749, 1751). This gives 526 maxims in alphabetical order, but *ejusdem generis* is not included. Nor does Blackstone's *Commentaries* (1765–9) mention it.

Turning to the law reports, the *ejusdem generis* rule is expressly contradicted in Coke's report of *Altham's Case* (1610), 8 Rep. 150b, at 154b. It is there laid down that "when the deed at first contains special words, and afterwards concludes in general words, both words as well general as special shall stand" (*c*). To the same effect is *Countess of Bridgewater* v. *Duke of Bolton* (1703/4), 6 Mod. 106. In that case there was a gift by will of mines, £5,000, and "all my plate and jewels, and all my other estate, real and personal". It was held that the concluding words "all my other estate" were to be given their full operation and so passed fee-farm rents. In his judgment Holt, C.J., gave a nice display of learning in Aristotelian logic. Report has it that Holt idled away his time at Oxford, and he certainly left the university without taking a degree; but his judgment in this case shows that he did not leave it altogether devoid of knowledge. "The word '*Estate*'", he said, "is a *genus generalissimum*, predicable of two species that have their difference, whereby they are divided, that is, *Estate real*, and *Estate personal*. 'Estate real' is *genus subalternum*, and has its species too"; and so on. All this might lead the casual reader to suppose that Holt was thinking of the *ejusdem generis* rule, but clearly he was not; his whole argument was directed against its existence.

Holt expressly distinguished the quaint old rule, which bore some resemblance to *ejusdem generis*, to the effect that "the general words

(*c*) *Turpine* v. *Forreyner* (1609/10), 1 Bulst. 99, gives a slight indication of the contrary rule that we now know as *ejusdem generis*. There was a grant of "the manor, tenements, and all other the lands, and tenements which he hath in the ville of Dale". The question was whether a term of years in Dale passed. One of the arguments of counsel against this construction was that by the concluding words should be intended "all others, of the same nature, quality and condition as the other lands before mentioned were, and not otherwise". The reporter says that Croke, Williams, Yelverton and Fenner, JJ., took the view that the term did not pass, but their precise reason does not appear and in any case their expression of opinion was *obiter*.

The same counsel cited in support of his argument *Lord North* v. *Bishop of Ely*, 18 Eliz. (1575–6). The decision, according to him, was that on a lease of a manor house and of certain named closes and of all other his lands and demesnes, an ancient park and copyhold land did not pass because they could not be construed as demesnes. This does not seem to be the *ejusdem generis* rule, for it appears to rest upon the construction of the general words without reference to the specific words. Also, what seems to be the same case is in 3 Dyer 261b (n.), where the version given is: "Easter 14 Eliz. The Bishop of Ely having manor of a park being parcel of the demesnes, leased all his demesnes of the manor, and in the same lease granted the custody of the park; the park itself shall not pass." If this was the decision it obviously had nothing to do with the rule under consideration.

of a statute beginning with inferior persons, etc., do not extend to superior persons" (*d*). It is significant that both Coke and Blackstone discuss this rule, though they make no mention of *ejusdem generis*. Had the *ejusdem generis* rule existed in their day, it is almost certain that mention of the one rule would have led them to speak of the other. The example given in Coke's *Institutes* (*e*) of the *non majoris dignitatis* rule (if we may so christen it) is that the river Thames, *nobile illud flumen*, cannot be included in general words following the enumeration of specific rivers. Blackstone's illustration is that "a Statute, treating of 'Deans, Prebendaries, Parsons, Vicars, and others having spiritual promotion' is held not to extend to Bishops, though they have spiritual promotion; Deans being the highest persons named, and Bishops being of a still higher order" (*f*). This rule resembles *ejusdem generis* in cutting down general words that follow specific words, but it differs in two ways. First, it operates only when the thing specified is of less dignity than the thing attempted to be brought in under the general words. Second, when it does operate it excludes things of greater dignity even though they be *ejusdem generis* with the things specified.

Again without claiming to have made an exhaustive search, the earliest case that I have seen decided on what we now know as the *ejusdem generis* rule is *Trafford* v. *Berridge* (1729), 1 Eq. Cas. Abr. 201. In that case "a man devised to his Niece all his Goods, Chattels, Household-stuff, Furniture, and other Things which then were, or shall be in his House at the Time of his Death, and some Time after he died, leaving about £265 in ready Money in the House; and it was decreed, that this ready Money did not pass; for by the Words *other Things* shall be intended Things of like Nature and Species with those before-mentioned". Observe the use of the word "species" in the concluding part of this passage. There may be no difference of substance whether the word "species" or the word "genus" be used, but the *ejusdem generis* rule could hardly have been well established under that name or else the Judge would probably have said "of like genus", not "of like species". Another point to remark about the decision is that it is a reasonable one whether or not the *ejusdem generis* rule be applied. Even if the bequest had simply been of the "things" that might be in the

(*d*) *Archbishop of Canterbury's Case* (1596), 2 Co. Rep. 46a at 46b; other cases are collected in Maxwell, Interpretation of Statutes, 8th ed. 297, and 42 Eng. & Emp. Dig. 673.

(*e*) 2 Inst. 478.

(*f*) 1 Comm. 88. Bentham's remarks on this are worth repeating. "This is to say, that if the Legislature will use general words, they (the Judges) will pay no regard to them. When did the Legislature ever tell them, that such words should operate downwards only and not upwards? Or who can be sure of whether an assemblage of articles are put or no in gradation? and who can be sure in such an assemblage of what is superior and what is inferior? Suppose Deans had been omitted, and Prebendaries had been the first word, would Canons have been to stand included or excluded? . . . 'Tis to construction such as this that we owe in great measure those never-ending specifications, under the load of which all legal instruments are overwhelmed" (Comments on the Commentaries 140).

Another rule that may reach the same result as the *ejusdem generis* rule, although it is not the same as it, is the rule that penal statutes are construed strictly. See the example given in Blackstone, 1 Comm. 88, and Bentham's Comments on the Commentaries 141–3.

testator's house at his death, it would have been reasonable to suppose that by the word "things" the testator meant "personal chattels" and so excluded money. Thus the *ejusdem generis* rule cannot in this instance be accused of having thwarted the testator's obvious intention.

Later in the century came Lord Mansfield's *dictum* in *Moore* v. *Magrath* (1774), 1 Cowp. 9, at 12. "It is very common", he said, "to put in a sweeping clause; and the use and object of it in general is, to guard against any accidental omission: but in such cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned."

Two years later was published the first edition of Lofft's reports, with a collection of maxims appended, and here the rule appears in its full flower. "*Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant.*" This is Maxim 419, placed under the heading "Of Pleas and Indictments". Where Lofft got it from, if he did not compose it himself, is a mystery. He tells us that his maxims "may be found in the *Institutes* and various Reports, in Bacon's *Law Tracts*, and in the book called the *Grounds of the Law*, or appear founded in self-evident Deductions of Reason". But, as I have said, I have not found this particular maxim in the *Institutes* of Coke or in earlier reports; nor is it in Bacon or in the *Grounds of the Law*. This leaves us only with the "self-evident deductions of reason". It may be noted that Lofft had literary leanings (he wrote the preface to his *Maxims* in Latin, and Wallace tells us that he published a great number of theological, political, poetical, astronomical, and other works), and he sounds just the sort of man to have made a few maxims up. In the index of maxims given in Broom, Lofft is quoted as the authority for twelve of them, including the one under consideration. It is possible that Lofft heard Lord Mansfield's utterance in *Moore* v. *Magrath* and founded the maxim on that, for although he does not himself report *Moore* v. *Magrath* his reports of Lord Mansfield's decisions run to the year in which *Moore* v. *Magrath* was decided.

No good purpose would be served by taking the reader through the career of the *ejusdem generis* rule in the nineteenth century. Suffice it to say that it caused a great deal of litigation (*g*) and seems frequently to have thwarted the intentions of the draftsmen of statutes, deeds, wills, contracts, and memorandums of association (*h*). Probably memorandums of association have suffered the most, and the judicial hostility towards general words has increased enormously the length and complexity of these documents. Indeed, in the case of memorandums of association there seems to be hardly any pretence that the rule is one of interpretation; instead it seems to be regarded almost as one of public policy, designed to protect shareholders against the company's venturing

(*g*) Cp. the criticism on this score in (1923) 39 L. Q. R. 274.

(*h*) The cases will be found collected in Norton on Deeds, 2nd ed. 246–51; Maxwell on Interpretation of Statutes, 8th ed. 289–97; Craies on Statute Law, 4th ed. 165–7; Beal's Cardinal Rules, 3rd ed. 64–8, 179–82, 355–8, 601–2; Jarman on Wills, 7th ed. 986–92; Odgers on Construction 127–30, 182–4; Broom's Legal Maxims, 10th ed. 396–401; Eng. & Emp. Dig., Index *s.v. Ejusdem Generis.*

into new fields of business (*i*). In the case of statutes, too, the Judges have sometimes seemed to be not displeased if by the application of the *ejusdem generis* rule they can minimise the interference with the existing law. Deeds and contracts have come off somewhat better, and wills best of all because in the case of wills the *ejusdem generis* rule has had to contend with the more powerful presumption against intestacy.

Hitherto in this article I have assumed that the *ejusdem generis* rule has some connection with logic. This needs explanation. The rule is not by any means a rule *required* by logic. On the contrary, if the aim of the law is to ascertain the intention of the framer of the document the application of the rule is illogical because it usually seems to defeat that intention. The rule can be said to be "logical" only in this sense, that its manipulation, according to one theory, involves a mental process well known to traditional logic.

Before going into this further, it must be premised that, despite the number of cases that have accumulated on the rule, the occasions when the Courts will apply it are still very uncertain. According to the great majority of cases the rule applies unless there is something to indicate an intention that it shall not be applied (*k*). But in some cases, such as *Anderson* v. *Anderson*, [1895] 1 Q. B. 749, it has been held that the rule applies only if there is evidence of an intent that it shall apply, and the mere fact that general words follow specific words is not enough. "The doctrine of *ejusdem generis*", said Lopes, L.J., "is a very valuable servant, but it would be a most dangerous master." Rigby, L.J., added that in his opinion it had "frequently led to wrong conclusions on the construction of instruments". These *dicta*, strong as they are, have not prevented later Courts from applying the doctrine in many cases where there was no evidence of an intent that it should be applied except the fact that general words followed specific words (see, *e.g.*, *Re Stockport Schools*, [1898] 2 Ch. 687) (*l*).

Assuming that a Court in any particular case is ready to consider the application of the rule, the next question that arises is as to its meaning and limits. Here we come to another difficulty. According to some authorities the general words are to be cut down to things that are *similar* to the particular things previously specified. Greer, J. (as he then was), took this view in *Aktieselskabet Frank* v. *Namaqua Co.* (1920),

(*i*) I have often wondered what the Courts would make of a memorandum containing no specified objects but purporting to enable the company to do anything. No draftsman to my knowledge has yet been bold enough to try this. An interesting attempt to change the attitude of the Courts has, however, been made by the introduction into some memorandums of association of the following paragraph: "And it is hereby declared that, in the interpretation of this [the objects] clause, the powers conferred on the Company by any paragraph shall not be restricted by reference to any other paragraph, or to the name of the Company, or by juxtaposition of two or more objects, and that, in the event of ambiguity, this clause and every paragraph hereof shall be construed in such a way as to widen, and not to restrict, the powers of the Company."

(*k*) For a case where the Court allowed the presumption to be rebutted somewhat easily on the construction of a contract, see *Larsen* v. *Sylvester & Co.*, [1908] A. C. 295.

(*l*) In *National Association of Local Government Officers* v. *Bolton*, [1942] 2 All E. R. at 433, Lord Wright said: "The *ejusdem generis* rule is often useful or convenient, but it is merely a rule of construction, not a rule of law." But the question is: is it a rule of construction that must be applied unless the context indicates a contrary intention, or one that the Court may or may not apply according to its feeling?

90 L. J. K. B. 36, and *Adelaide S.S. Co.* v. *R.* (1923), 29 Com. Cas. 165, at 170. But the better view is that the general words are not necessarily to be cut down to things similar to the particular things, but need only be cut down to things that fall within the same genus as the particular things. As Maxwell puts it, " the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words, unless there be something to show that a wider sense is intended ". See to the same effect the valuable judgment of McCardie, J., in *Magnhild* v. *McIntyre Bros. & Co.*, [1920] 3 K. B. 321 (reversed on other grounds, not affecting the doctrine of *ejusdem generis*, [1921] 2 K. B. 97). If this is so, a logical operation is involved in applying the rule. One must first see whether the things particularly enumerated constitute a class or genus, and then whether the enumeration is incomplete. If both these conditions are satisfied, but only then, the *ejusdem generis* rule will be applied to cut down the meaning of the general words.

It follows from this latter way of stating the rule, as Scrutton, L.J., noted in his work on *Charterparties* (14th ed., p. 259), that " the more diverse the specified things, the wider must be the genus that is to include them: and by reason of the diversity of the specified things the genus that includes them may include something that is not like any one of the specified things ". This view thus gives a markedly different result from that of Greer, L.J. The logical difference seems to be that whereas Greer, L.J., would cut down the general words to the total of the *proxima genera* of each of the specified things, Scrutton, L.J., would cut them down only to the *proximum genus* of all the specified things taken together.

To a modern logician Scrutton, L.J.'s, view would probably be preferable. The logician has learnt from Darwin that genera and species are not eternal and immutable divisions, fixed in the order of nature, but are man-made and mutable. A single species may be subsumed under any one of a number of genera, according to the particular quality that is being observed (*m*). To take a humble example, a plate is a species of domestic utensil, but it is also a species of round thing; and " domestic utensil " and " round thing " are two distinct genera, it being impossible to subsume the one under the other. If this is so, it is impossible to say offhand what is the genus of any one species. Or, to put the same point in somewhat different words, it is impossible to say whether thing A is *similar to* thing B without knowing the quality of B that is to be looked for in thing A in order to constitute the resemblance. On the other hand, if we are given two or more things, A, B, etc., we can say whether Z is similar to them taken as a class, because we can abstract from A, B, etc., their common qualities and ask whether Z possesses all these common qualities.

Perhaps an illustration of Scrutton, L.J.'s, theory is the case of *R.* v. *Payne* (1866), L. R. 1 C. C. R. 27. The question there turned on the Prison Act, 1865, which forbade the conveyance into any prison, with

(*m*) Cp. Schiller, Formal Logic, Chaps. V and VI.

intent to facilitate the escape of a prisoner, of any mask, dress, or other disguise, or of any letter, or any other article or thing. It was held that the concluding words covered a crowbar. No reasons were given, but it may perhaps be conjectured that the governing factor was the specific mention of "any letter". The *proximum genus* of "letter" and "disguise" must be fairly wide (the narrowest possible genus seems to be that of "articles likely to help a prisoner to escape"), and thus a crowbar fell within it. Had the specific words simply enumerated kinds of disguises the genus would have been "disguise", and the crowbar would presumably have been ruled out.

A similar view was taken by MacKinnon, L.J., in the recent case of *Egham Electricity Co.* v. *Egham U. D. C.*, [1942] 2 All E. R., at 157, where the contract provided that there should be no liability for failure to perform owing to "fire, frost, accident, strikes, lock-outs or combination of workmen or cessation or restriction of work by workmen", followed by the general words "or from any other unavoidable cause over which the company has no control". With regard to the particular words the learned Lord Justice said: "Those are things of an extraordinarily varied type and the genus that could include them would be one of a very wide character." However, he went on to say, "I do not think it is necessary to stress that, because the clause goes on 'or from any other unavoidable cause over which the company has no control,' and in such circumstances I think clearly the company could successfully contend that this inability created by the order of the Minister, having the force of statutory prohibition, was an 'unavoidable cause over which the company has no control'." I must confess that I cannot understand this last sentence unless it means that the *ejusdem generis* rule does not exist. The learned Lord Justice seems to assume that the question is concluded merely by a finding that the matter comes within the general words; but the *ejusdem generis* rule, if it exists, requires that the matter should come not only within the general words but also within the genus of the particular words. Yet if MacKinnon, L.J., meant to assert that the rule did not exist, it is strange that he did not say so more plainly.

To revert to the assumption that the rule exists (although personally I hope that the assumption is wrong), we see from the foregoing authorities that the genus is obtained by abstracting the common qualities of the different species mentioned. It is obvious that this process of abstraction affords considerable scope for judicial ingenuity in widening or narrowing the class. For instance, in *Powell* v. *Boraston* (1865), 18 C. B. (N.S.) 175, a question arose on the meaning of the words "house, warehouse, counting-house, shop or other building" in the Reform Act. Did they cover a temporary shed? Now, the genus of the specific words might have been regarded as any building, in which case the general words would take effect as expressed and would cover a temporary shed. But, more narrowly, the genus of the specific words might have been taken to include only buildings that were (a) of a certain degree of durability, and (b) constructed either for residence or for commerce. The Court adopted the narrower view of the genus and so ruled out the temporary shed.

An example of the Court adopting a wider view of the genus is afforded by *Monck* v. *Hilton* (1877), 2 Ex. D. 268. The statute to be construed made it an offence to use " any subtle craft, means or device by palmistry or otherwise to deceive and impose on any of His Majesty's subjects ". Did this provision hit a bogus spiritualist? Counsel for the defendant ingeniously found a genus that would include palmistry but not spiritualism, namely a genus including only such arts of divination as palmistry, physiognomy, chiromancy, and perhaps rhabdomancy (divination by rod or wand). Pollock, B., however, adjusted the genus to cover any acts " assuming a special power beyond the ordinary limits of human agency ", and so included the spiritualist. Cleasby, B., contented himself with saying that the pretence of the defendant was not so entirely different from palmistry as to be ruled out.

The selection of a wide genus, then, indicates a way in which the *ejusdem generis* rule may be deprived of some of its effect. In addition to this there are certain circumstances in which the rule may be *wholly* deprived of its effect—*i.e.*, in which it may fail to cut down the operation of general words in any respect at all. It is a tribute to the ingenuity of our Judges that they have discovered no fewer than four ways in which this may happen. The first is where the specific instances do not disclose a genus narrower than the general words themselves. The second is where the specific instances exhaust the genus that is implied by them. The third is where the apparent specific instances are themselves genera. The fourth and last is where only a single specific instance is mentioned. Of these in their order.

As to the first, the leading case is *Tillmanns* v. *S.S. Knutsford*, [1908] 2 K. B. 385, where Vaughan Williams, L.J., said (at p. 395): " If a common genus is not to be found the necessary consequence would be that the words ' or any other cause ' could not be limited by the doctrine of *ejusdem generis*." Similarly, Farwell, L.J., said (at p. 403): " Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine." These *dicta* were applied by McCardie, J., in the *S.S. Magnhild Case*, already mentioned. In that case a charterparty referred to " loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer ". McCardie, J., held that the meaning of the concluding words was not to be restricted, because he found himself unable to assign any genus to the specific words, except presumably the genus " accident preventing the working of the steamer ". It is not quite correct to say in a case like this that there is no genus for the specific words; there is a genus, but it is identical with the concluding words. Since the concluding words *are* the genus they cannot be cut down by the *ejusdem generis* rule. Another illustration is *National Association of Local Government Officers* v. *Bolton*, [1942] 2 All E. R. 425, where the words that fell to be construed were the statutory definition of " workman ", *viz.*, " any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise ". Viscount Simon, L.C., said: " The use of the words ' or otherwise ' does not bring into play the *ejusdem*

generis principle, for ' manual labour ' and ' clerical work ' do not belong to a single limited genus. The only common class to which manual labour and clerical work can be said to belong is the broad class of ' mode of service '." Similarly, Lord Wright said that the *ejusdem generis* rule " presupposes a genus; but here the only ' genus ' is a ' contract with an employer ' ". These *dicta* seem to mean that the *proximum genus* of " contract with an employer by way of manual labour " and " contract with an employer by way of clerical work " is simply " contract with an employer ", and thus the words " or otherwise " must refer to all contracts with an employer other than those by way of manual labour or clerical work. By this tortuous process of reasoning we come to the conclusion that the words " or otherwise " mean what they say.

For the second way in which the *ejusdem generis* rule may fail to cut down general words the chief authority is the much-quoted *dictum* of Willes, J., during argument, in *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at 315: " If the particular words exhaust a whole genus, the general word must refer to some larger genus." He said this *à propos R.* v. *Payne*, for which a different explanation was suggested above.

For the third the authority is a recent *dictum* of Lord Romer. In *Knightsbridge Trust* v. *Byrne*, [1940] A. C. 613, a question arose on the meaning of the words in a statute, " debenture . . . debenture stock, bonds and any other securities of a company ". The noble lord said: " If no one seems to know exactly what ' debenture ' means, no one can be expected to know what is *ejusdem generis* with it. Indeed, the very fact that no one seems to know exactly what debenture means indicates pretty plainly that debenture is itself the name of a genus and not of a species. In my opinion the words ' any other securities ' mean what they say, and include all other securities of any kind whatsoever." With all respect to Lord Romer, his logic is not so good as Holt's. Holt, in the *Countess of Bridgewater's Case* (above), recognised that it is possible to conceive of a genus that is both genus and species—genus with respect to the species of which it is predicated, and species with respect to the genus that is predicated of it. Thus " estate real " is a species of the genus " estate ", but is itself the genus of the species " life estate ". To such an intermediate class logicians give the name that Holt himself used; they call it a subaltern genus or species. The only genera and species that are not subaltern are (1) the *summum genus* (Holt's *genus generalissimum*), the widest class of all, and (2) the *infima species*, the lowest species, which can be predicated only of individuals. Now it can hardly be contended that " debenture ", whatever its precise meaning, is a *summum genus*. The mere fact that its meaning is not precise cannot make it a *summum genus*, for the meaning of few, if any, words is absolutely precise. If it is not a *summum genus* it must be from one point of view a species, even though it be from another point of view a genus as well. If it be a species, it should surely be possible to find a genus that could be predicated of " debenture ", " debenture stock ", and " bonds ". It may be that the *proximum genus* is none other than the concluding words of the statutory provision, namely " any securities of a company " (for " bonds " in the context clearly refers to bonds of a

company). In that case the *ejusdem generis* rule would fail to cut down the general words not because " debenture " is a genus but because the general words are themselves the genus of the particular words.

For the fourth way in which the *ejusdem generis* rule may fail to cut down general words the authority is again a fairly recent decision. This is *United Towns Electric Co.* v. *Att.-Gen. for Newfoundland*, [1939] 1 All E. R. 423, where the Privy Council laid it down that " there is no room for the application of the principle of *ejusdem generis* in the absence of any mention of a genus, since the mention of a single species—for example, water rates—does not constitute a genus ". It would have been more accurate to say that a single species cannot *yield* a genus—that a genus is obtained by abstracting the common qualities of several species, and that the mention of a single species gives no indication of the appropriate genus. This view is logically sound, but against it there comes to mind the famous case of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653, where it was held, on the construction of a power in a memorandum of association " to carry on the business of mechanical engineers and general contractors ", that the term " general contractors " must be referred to that which went immediately before, notwithstanding that the latter term (" mechanical engineers ") appears to have been simply a single species. The phrase " *ejusdem generis* " was not used in the speeches in the House of Lords, but even if not strictly a decision on the *ejusdem generis* rule it is certainly a decision on the wider rule *noscitur a sociis*, and the effect of it is precisely the same as if the rule were called the *ejusdem generis* rule. See also *Stag Line, Ltd.* v. *Foscolo, Mango & Co.*, [1932] A. C. 328. These decisions seem to show that the decision in the Newfoundland case must be taken with caution.

It may perhaps be said that although the propositions in *Knightsbridge Trust* v. *Byrne* and the *Newfoundland* case are expressed as matters of logic, they are really motivated not by a love of logic but by a dislike of *ejusdem generis*. Now that the House of Lords is in a reforming temper there is urgent need for it to be given an opportunity to review the whole doctrine.

THE PRESENT STATE OF THE RULE IN *HOWE* v. *LORD DARTMOUTH*.

By S. J. BAILEY, LL.M., Barrister-at-Law.

In ordinary circumstances, when property has been settled upon trust for A for life, and thereafter for B absolutely, the whole of the net income derived from the property until A dies is payable to him. Such is his right, neither more nor less. Though this income be abnormally high, nothing of it is held back for the benefit of B. Though it be abnormally low or non-existent, neither A nor his executors after him has any right to claim a compensation out of the capital value of the

property or out of any enhanced income it may yield after he dies. So long as the trust comprises property which produces an abnormally low or high income, any incidental hardship to A or B must be borne. But if the trustees have the power to dispose of that particular property and re-invest in something which will produce a more fair and steady income, this inequitable state of affairs will cease if and when they choose to do so (*a*). It is perhaps surprising that equity has not cast upon trustees, in every such case, a duty to convert the trust property as soon as practicable into something more likely to produce an equitable result. One might have expected further, perhaps, that in every such case equity would require the trustees to make some financial adjustment, as between the beneficiaries, to cover the intervening period during which the desired conversion is delayed. In fact, however, equity does not ordinarily intervene in these cases; but to this there are three celebrated exceptions. The three exceptions have much in common: they apply only where the trust is created by will, and only in so far as the property comprised in the trust is the residuary personal estate of the testator; and they are said to rest upon his presumed intention to deal evenly with the beneficiaries under the trust. This is no doubt the reason why they are often grouped together, and described as the rule in *Howe* v. *Lord Dartmouth* (*b*). In origin, however, they are three distinct rules: (i) the rule in *Gibson* v. *Bott* (*c*), (ii) the rule in *Howe* v. *Lord Dartmouth*; and (iii) the rule in *Re Chesterfield's Trusts* (*d*). Of these, rules (i) and (ii) operate chiefly to prevent a life-tenant from obtaining an unjust advantage to the detriment of the remainderman (*e*), whilst rule (iii) operates in the reverse direction in order to prevent an injustice to the tenant for life.

§ 1.—*Rules to prevent the tenant for life from obtaining an unjust advantage to the detriment of the remainderman.*

It is clear that where property comprised in a settlement is of a *wasting* or *hazardous* nature, the expectations of the remainderman are likely to be disappointed. Meanwhile, on the assumption that wasting

(*a*) The so-called equitable duty of trustees "to hold the scales evenly between the beneficiaries" does not ordinarily appear to compel them to realise and re-invest in such a case: see *Re Courtier* (1886), 34 Ch. D. 136, C. A.; *Re Searle*, [1900] 2 Ch. 829, 834 ("if the estate produces nothing, the tenant for life can get nothing"), *per* Kekewich, J. On the other hand, when trustees do exercise a power to invest, they must not allow themselves to be persuaded into an investment, prejudicial to one beneficiary, in order to benefit another of their beneficiaries: *Raby* v. *Ridehalgh* (1855), 7 De G. M. & G. 104.

(*b*) (1802), 7 Ves. 137. See, *e.g.*, *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101, 112, *per* Baggallay, L.J. (*c*) (1802), 7 Ves. 89.

(*d*) (1883), 24 Ch. D. 643. Note that the judgment of Simonds, J., in *Re Woodhouse*, [1941] Ch. 332, which finally decided that this rule has no application to trusts of real estate, was based in part on the fact that the other two rules do not apply to real estate. But the learned Judge, throughout his judgment, treated the three rules as distinct from one another. "This is an equitable rule established by this Court in order to deal fairly in the administration of estates between persons having successive interests in a residuary estate. It is a rule of administration which, in my judgment, is to be regarded as complementary to other rules of administration established also to do justice as between persons entitled to successive interests, as, for example, the rule in *Howe* v. *Earl of Dartmouth*": *ibid.*, at pp. 334—335.

(*e*) It has recently been made clear, in *Re Fawcett*, [1940] Ch. 402, that these two rules may also operate to prevent injustice to the life-tenant. See § 2, *post*.

and speculative properties are prone to produce (while they last) a higher income than trustee securities, the life-tenant may well be profiting abnormally so long as such property is retained in the settlement. When equity intervenes, in order to deal evenly with the beneficiaries in such a case, equity requires the trustees to realise these wasting or hazardous assets, and to invest the proceeds in trustee securities. Moreover, so long as such conversion is delayed, the life-tenant is permitted to receive as income only so much as would have been produced had the properties been already converted into a 4 per cent. investment: any surplus income being retained by the trustees as capital and invested by them in trustee securities. Generally speaking, all residuary personalty is deemed to be "*hazardous*" for the above purposes, if it is not a trustee investment authorised by law or by the terms of the will. The term "*wasting*" was held to bring all leaseholds into the same category. Freeholds, however, are unaffected by the rule, however hazardous or wasting their value in fact may be (*f*).

Sometimes, of course, a settled bequest of residuary personalty contains an *express* trust to convert and invest in trustee securities. Nevertheless, as was decided in *Gibson* v. *Bott* (*g*), equity's rule as to the apportionment of income pending the desired conversion applies equally to such a case. However the duty to sell may have arisen, it is equally inequitable to allow one beneficiary to obtain an unfair advantage from unsatisfactory investments comprised in the residue whilst they remain unsold (*h*). If the will itself imposes a trust to convert, equity merely adds its rules designed to prevent injustice during the period which will elapse before the desired conversion is carried out. But if, as occurred in *Howe* v. *Lord Dartmouth* (*i*), the will does not itself compel a conversion into authorised investments, equity introduces an implied duty to convert any unauthorised or wasting assets, and adds to this its rules for preventing injustice pending conversion, as before. Another way of describing the situation, when the residuary personalty of a testator has been settled by his will, is to say that any unauthorised investment comprised in the residue is held by the executors or trustees upon trust for sale (whether imposed by the will itself or by *Howe* v. *Dartmouth*); that thereupon equity treats that which ought to have been done as having been done; and that consequently the beneficiaries are treated, from the outset, as if the investment has been replaced by authorised securities yielding 4 per cent. (*k*).

So far as leaseholds are concerned, the position has been altered by the Law of Property Act, 1925. Section 28 of that Act enacted that, when "land" is held after 1925 upon trust for sale, the net rents

(*f*) See, *e.g.*, the authorities mentioned in *Re Woodhouse*, [1941] Ch. 332.

(*g*) (1802), 7 Ves. 89. See also *Meyer* v. *Simonsen* (1852), 5 De G. & Sm. 723; *Brown* v. *Gellatly* (1867), 2 Ch. App. 751.

(*h*) See also *Re Fawcett*, [1940] Ch. 402, 406—407, where Farwell, J., construed a trust to invest as a duty to invest in trustee securities, and thereby found that the will itself impliedly imposed a trust to sell so much of the residuary personalty as consisted of investments not authorised by law for the investment of trust funds.

(*i*) (1802), 7 Ves. 137.

(*k*) See *Re Fawcett*, *supra*, at p. 407, for this line of reasoning, and for the reason why it has become the general, although not the universal, practice to allow 4 per cent.

therefrom are to be applied in the same way as the income of investments of the proceeds of sale would be applied, except where the trust directs the contrary. It follows that the life-tenant of settled residue held upon trust for sale (whether by virtue of the will or by *Howe* v. *Dartmouth*) is now ordinarily entitled to claim in full the net income of any leaseholds comprised in the residue, so long as the leaseholds remain unsold. To this extent then, the rules of equity are now powerless to intervene : they can no longer withhold from the life-tenant any abnormally high income which this " wasting " asset may be producing whilst a sale is delayed. This being the situation, it seems natural to assume that equity must now feel, even more strongly than before, that the sooner such leaseholds are sold, the better. The sooner they are sold and converted into trustee securities, the sooner this inequitable advantage to the life-tenant will end (*l*). Nevertheless, it has been widely assumed by writers of repute, that by shearing *Howe* v. *Dartmouth* of its ancillary power to adjust the life-tenant's income pending a sale, the Act has by some process disabled it from achieving its primary purpose of ensuring that there be a duty to sell such " wasting " leaseholds and replace them by trustee securities. This question, whether the rule in *Howe* v. *Dartmouth* still operates upon settled residuary leaseholds to raise an implied trust for sale, has not yet received judicial attention. The recent decisions have been concerned only with residuary gifts of the *Gibson* v. *Bott* type, in which the leaseholds were already subjected to an undoubted trust for sale irrespective of any assistance from the rule (*m*). Yet it is important to know whether *Howe* v. *Dartmouth* still raises a trust for sale, where there is nothing else to impose one; for upon this depends the question whether the leaseholds are " settled land " within the meaning of the Settled Land Act, 1925 (*n*). It would appear that a lease having " sixty or more years unexpired " now ranks as an authorised investment for the purposes of the rule (*o*). The question remains whether the rule still operates to imply a trust to convert leases having less than sixty years to run (*p*).

(*l*) See 4 Cambridge Law Journal, pp. 357—365.

(*m*) *Re Brooker*, [1926] W. N. 93 (express trust for sale); *Re Berton*, [1939] Ch. 200 (statutory trust for sale raised by tenancy in undivided shares).

(*n*) Apparently personal representatives cannot evade this difficulty by exercising their statutory power of appropriation under s. 41 of the Administration of Estates Act, 1925: see sub-s. 6 of that section. But it would appear that they can evade it by retaining the leaseholds in their own hands until sale or until the life interest ends: see 3 Conveyancer, pp. 236—240.

(*o*) This appears to follow from the joint effect of the Settled Land Act, 1925, s. 73 (1), (xi), the Law of Property Act, 1925, s. 28 (1), and the Administration of Estates Act, 1925, s. 39 (1). See 6 Conveyancer, pp. 155—158.

(*p*) (i) It has been argued that the rule cannot now imply a trust to sell leaseholds, because s. 28 (2) of the Law of Property Act, 1925, enacts that where they *are* held on trust for sale the life-tenant is now entitled to the whole income until they are sold: 1 Wolstenholme & Cherry's Conveyancing Statutes (12th ed.) 271. This argument would seem to imply that the long-presumed intentions of testators, to secure equitable treatment for their beneficiaries by a conversion of the wasting assets, are now displaced by an imputed knowledge that, until such conversion occurs, the situation is now (by statute) even more inequitable than it used to be. (ii) The fact that s. 25 of the Act implies an ancillary power to postpone, when leaseholds *are* held on trust for sale, would seem to be an even less convincing ground for arguing that *Howe* v. *Dartmouth* is now unable to raise a trust for sale. Neither section applies, moreover, where a contrary intention appears. See, further, 4 Cambridge Law Journal, 357—365.

Any realty included in a settled residuary gift is unaffected by the foregoing equitable rules (*q*). But the fact that a residuary gift includes realty does not prevent the rules from applying to any personalty comprised in the gift. Nor does the presence of personalty ordinarily extend the rules to any realty contained in the residue. Yet if there is an indication in the will that the proceeds of both residuary realty and residuary personalty, subjected to an express trust for sale, are to be held as one fund and, further, are to be kept together, there is authority to the effect that the life-tenant is not then entitled, pending conversion, to the whole income even of the realty. The more recent cases have usually managed to avoid this result (*r*).

These equitable rules are inapplicable, in every case, if the testator's will shows a sufficiently clear intention to exclude them. The multitude of decisions upon this aspect of the subject is somewhat troublesome. There is an established presumption, however, that the rules must be applied; and this presumption stands unless it is displaced by a contrary intention found in the will (*s*). Where the will itself imposes a duty to convert, the problem is simply whether anything contained in it indicates that the life-tenant is to have in full the net income produced while the property remains unsold. A clear illustration is the direction, commonly found in settled residuary bequests, to the effect that the income of so much of the residue as for the time being shall remain unsold shall be applied as if the same were income arising from investments of the proceeds of the sale thereof (*t*). But a mere power to postpone sale, or to retain existing investments, does not necessarily imply that the life-tenant is to be paid the actual income produced pending conversion. It is construed as having that effect if it amounts to an authority to retain the property indefinitely; for it may then be said to give that property something of the status of a permanent investment authorised by the will (*u*). In many cases, however, the power to postpone or to retain existing investments, properly construed, is only ancillary or subsidiary to the trust for conversion: the true inference will then be that it was inserted merely for the convenient administration of the estate—*i.e.*, in order to allow a conversion to be postponed until the trustees can sell advantageously (*x*). When the will does *not* itself direct a conversion, the position is somewhat different. Here the testator's words may conceivably be inconsistent with the rule of equity that implies a duty to sell any wasting or hazardous properties comprised in the residue; or his words may be inconsistent only with the further implication of equity whereby, pending such a sale, the amount of income

(*q*) *Casamajor* v. *Strode* (1809), 19 Ves. 390 n.; *Re Woodhouse*, [1941] Ch. 332, 335.
(*r*) See *Re Oliver*, [1908] 2 Ch. 74, reviewing the authorities.
(*s*) *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101, 124, *per* James, L.J. Accordingly, the onus is always "upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case": *ibid.* See also *Re Warcham*, [1912] 2 Ch. 312, C. A.
(*t*) See 2 Key & Elphinstone's Precedents in Conveyancing (14th ed.), pp. 877—878.
(*u*) *Re Inman*, [1915] 1 Ch. 187, 191: the normal inference from a power to continue or retain an investment permanently is that the testator intended the tenant for life to get any benefits resulting therefrom.
(*x*) *Re Chaytor*, [1905] 1 Ch. 233; *Re Inman*, *supra*.

payable to the life-tenant is to be adjusted. In such cases it appears that any words indicating that the trustees need not sell at once are usually regarded as sufficient to negative both of these equitable implications (*y*). Accordingly, where the will has not itself imposed a duty to convert the residue, the presence of an express power to retain or sell as the trustees shall see fit is usually sufficient to oust the rule in *Howe* v. *Dartmouth* entirely (*z*). So also are any other words which import that the property is to be used or enjoyed in the state in which the testator left it at his death, or which are otherwise inconsistent with an immediate conversion (*a*). But a power to retain may be so framed as to show that the life-tenant is not intended to reap any advantage from it: in that case the income will have to be adjusted in the *Howe* v. *Dartmouth* fashion (*b*). On the other hand, it may be so expressed as to indicate that the testator has promoted the wasting or hazardous property in question to the status of an authorised investment: in such a case equity will respect his wishes, and the life-tenant will be entitled to the net income in full (*c*).

We now pass to the manner in which income derived from wasting or hazardous properties should be adjusted, in cases where it is impossible to rebut equity's presumption that the life-tenant of settled residuary personalty was not intended to have the specific enjoyment of such income. First, appropriate action must be taken in the ordinary way, in order to ensure that the burden of any debts and pecuniary legacies is properly apportioned, as between capital and income (*d*). Any unauthorised securities still in hand at the expiration of a year from

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(*y*) *E.g.*, *Gray* v. *Siggers* (1880), 15 Ch. D. 74, 77; *Re Nicholson*, [1909] 2 Ch. 111. Thus in this type of case (unlike that in which there is an express trust to convert, see note (*x*) above) the Courts do not suspect that an express power to retain may possibly have been intended as merely ancillary to a primary desire for a conversion into authorised securities. Instead, they treat the express power to retain as an indication that the testator did not intend any trust for conversion.

(*z*) *Brown* v. *Gellatly* (1867), 2 Ch. App. 751, appears at first sight to be inconsistent with the other decisions on this point. A holograph will began by leaving everything to trustees, "giving them full power, except as hereinafter provided, to realise the same when and in such manner as they may see fit, without being personally responsible for such realisation". Then followed various specific and pecuniary legacies, and a settled gift of residue. In applying the rule in *Howe* v. *Dartmouth*, Lord Cairns paid no attention to the introductory power, though it clearly implied a power to retain. Presumably he treated it merely as an authority to administer the estate as a whole, and not as indicating any special intentions about the residuary gift.

(*a*) *Per* Thesiger, L.J., *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101, 122, where the Court of Appeal was divided as to the true construction of the words used in the particular will.

(*b*) *E.g.*, *Brown* v. *Gellatly*, *supra*: as to his ships comprised in the settled residue, the testator's will empowered his trustees to sail the ships "for the benefit of my estate" until they could be satisfactorily sold. *Held:* these words showed that his estate as a whole (not the life-tenant only) was intended to reap any financial benefits from retaining the ships. Presumably an alternative ground for this decision might have been that this power to retain the ships was evidently merely ancillary to a desired conversion. Cp. footnote (*y*), *ante*.

(*c*) *Brown* v. *Gellatly*, *supra*, *per* Lord Cairns, at pp. 758—759, construing an express power "to invest at their discretion or allow to remain as at present invested" all funds in certain named securities, as implying that any proceeds of property converted might properly be invested in such securities.

(*d*) See the line of cases concerned with the rule in *Allhusen* v. *Whittell* (1876), 4 Eq. 295.

the testator's death should then be valued, as at that date (*e*). One should then total these values and calculate what income this total sum would produce if laid out at interest at 4 per cent. (*f*). This calculated income, and no more, is payable to the life-tenant as his income in respect of unauthorised investments still unconverted. In other words, the measure of his income from them is an assumed 4 per cent. return on the aggregated (*g*) values (taken a year after the testator died) of such unauthorised investments as are still in hand. But although unauthorised investments so retained are thus valued as at the expiration of one year from the date of the testator's death, the assumed 4 per cent. payable as income to the tenant for life dates from the testator's death (*h*). Where unauthorised investments have been sold *within* the year, the basis of the calculation is necessarily rather different; the life-tenant is paid at the rate of 4 per cent. *per annum* for the period which intervened between the testator's death and the completion of the sale; but here one takes the net proceeds of the sale as the assumed capital value upon which the 4 per cent. is to be calculated (*i*). In either case, however, if at the end of any accounting period it is found that the unauthorised investments have in fact produced an income larger than the 4 per cent. payable to the tenant for life, the excess must ordinarily be regarded as capital and invested in authorised securities (*k*), and the life-tenant is thereafter entitled to specific enjoyment of whatever income these investments of surplus income produce (*l*). The practice described in this paragraph was followed, and in part formulated, by Farwell, J., in the recent case *Re Fawcett*, [1940] Ch. 402 (*m*).

(*e*) Occasionally the value has been taken as at the testator's death. Thus in *Brown* v. *Gellatly* (1867), 2 Ch. App. 751, the ships to be sailed " for the benefit of my estate " until they could satisfactorily be sold, were valued as at the testator's death, whereas the other unauthorised investments comprised in his residuary personalty were valued as at a year from his death. As to the ships, the Court was following the third division formulated in *Meyer* v. *Simonsen* (1852), 5 De G. & Sm. 723. So was Eve, J., in *Re Evans' Will Trusts*, [1921] 2 Ch. 309, 317; but he ordered a valuation as at a year from the death. Executors are not ordinarily expected to complete administration before the end of the " executor's year ": see *Re Tankard*, [1942] Ch. 69. It is logical therefore to assume that a testator would not ordinarily assume a conversion of unauthorised investments at an earlier date, for the purpose of fixing the rights of the beneficiaries. The general principle appears to be that the value should be taken as at the time when the securities ought to have been converted: see, *e.g.*, *Re Woods*, [1904] 2 Ch. 4, 12.

(*f*) The rate has varied in the past: *e.g.*, it was assumed at 3 per cent. in *Brown* v. *Gellatly* (1867), 2 Ch. App. 751. But it appears no longer to depend upon the rate of interest obtainable by investing in Consols, and *semble* is uniformly taken nowadays at 4 per cent., for reasons described by Farwell, J., in *Re Fawcett*, [1940] Ch. 402, 407.

(*g*) *I.e.*, for the purposes of these calculations the unauthorised investments for the time being are aggregated: *Re Owen*, [1912] 1 Ch. 519; *Re Fawcett*, *supra*.

(*h*) It will be remembered that a residuary gift has ordinarily carried its intermediate income as from the date of the death.

(*i*) *Re Fawcett*, [1940] Ch. 402, at pp. 407, 409.

(*k*) There is an exception in so far as such surplus income, unless already invested, may be used for making up to the life-tenant the deficiencies (*i.e.*, below 4 per cent.) of former years. See § 2, *post*.

(*l*) *I.e.*, excess income so invested is treated like any other authorised investments comprised in the residue: *Re Woods*, [1904] 2 Ch. 4 (deciding that this is so whether the duty to convert is express or is raised by *Howe* v. *Dartmouth*).

(*m*) The reasons there given for retaining 4 per cent. as the assumed rate of interest of trustee investments, the practice where unauthorised investments are producing less

§ 2.—*Rules to prevent injustice to the tenant for life.*

(a) The foregoing rules clearly show that equity's test of justice as between life-tenant and remainderman, when unauthorised investments are found in a settled residuary bequest, is that the life-tenant shall have 4 per cent. on their value. What, then, if they are not in fact producing a sufficiently high return to provide this 4 per cent. income for him? *Re Fawcett*, [1940] Ch. 402 (*n*), has decided that he is entitled to have any deficiency made up to him. This is to be done primarily out of any excess income (*i.e.*, beyond 4 per cent. on the valuation) which they may chance to produce in a subsequent accounting period (*o*). But if the income they produce in subsequent years is not sufficient to cover past deficiencies, the life-tenant is fated to remain out-of-pocket until the unauthorised investments (or some of them) are subsequently sold (*p*). Thereupon, he will be entitled to a refund (with interest) (*q*) out of the proceeds of the sale (*r*). It should be remembered, however, that where only one (or some) of several unauthorised investments is showing a low return, there may in fact be no deficiency to make up in this fashion; for the other unauthorised investments may, at the same time, be producing a high return sufficient to raise the total yield, for the accounting period in question, to the necessary 4 per cent. The unauthorised investments in hand during any given accounting period are aggregated for the purpose of these *Howe* v. *Dartmouth* calculations (*s*).

(b) If a settled residuary gift includes some reversionary interest,

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than 4 per cent. (see § 2, *post*), and the practice where unauthorised investments are sold within the year, appear not to have been formulated previously. The judgment, though brief, is very comprehensive. It appears to be of general application. The facts were peculiar in that the duty to convert was there held to arise by implication from an express power to invest: but the rule in *Howe* v. *Dartmouth* was avowedly applied. *Re Fawcett* would therefore appear to imply that the rules for adjusting income are identical, whether the trust to convert arises under or independently of *Howe* v. *Dartmouth*. At p. 409, there is a *dictum* that the judgment given would "not necessarily apply" in a case where there is an express power to postpone conversion. But presumably this refers only to the point that, had there been such an express power to postpone (which there was not), it might have negatived any implication of a trust to convert whether under *Howe* v. *Dartmouth* (*ante*, footnotes (*y*)—(*a*)) or from the expressed power to invest.

(*n*) As to the scope of this decision, see the preceding footnote.

(*o*) But not out of any excess received in a *preceding* year, for this ought already to have been invested as capital: *Re Fawcett*, [1940] Ch. 402, 410. Meanwhile the arrears carry simple interest at 4 per cent.: *ibid.*

(*p*) But he cannot claim reimbursement out of the proceeds of a *previous* sale of unauthorised investments, if at the date of their sale no arrears were yet chargeable against them; for such proceeds ought already to have been re-invested: *ibid.*

(*q*) For this purpose past deficiencies bear interest, to be "calculated at 4 per cent. simple interest but less tax": *Re Fawcett*, *supra*, at p. 408.

(*r*) The rules here stated in the text are an attempt to combine with the principles expressed in the judgment certain additional points (*e.g.*, as to deficiencies being made up out of future excess income) which appear only in its final paragraph embodying the terms of the proposed declaration.

(*s*) See footnote (*g*), *ante*. No reversionary interests were under consideration in *Re Fawcett*, [1940] Ch. 402, from which the above rules are taken. The question whether they too should be aggregated with unauthorised investments, for these accounting purposes, did not therefore arise. But the tendency to bring the rule in *Re Chesterfield's Trusts* into line with the rule in *Howe* v. *Dartmouth*, suggests a possibility that the law may conceivably develop in this direction. The difficulty, of course, is to make a really fair valuation of reversionary property: presumably this is the reason why the rule in *Re Chesterfield's Trusts* is so framed as to avoid one.

it is obvious that this item will produce for the life-tenant no income whatever, unless it falls into possession within his lifetime. Accordingly, a compensation has been engineered for him, by the rule in *Re Earl of Chesterfield's Trusts* (*t*), but he must wait until the reversionary interest falls in or is sold (*u*). In that case the settled residuary personalty had been bequeathed subject to an express trust for conversion with power to postpone conversion at the discretion of the trustees. It is therefore clear that where there is an express trust to convert, the addition of a discretionary power to postpone conversion does not necessarily imply that the testator wished to penalise the life-tenant whilst conversion is delayed; indeed, the presumption is the contrary (*x*). If he makes his intentions sufficiently clear, however, the testator can effectively exclude the rule. It has been held that even the clause customarily inserted to exclude *Howe* v. *Dartmouth* ordinarily operates also to exclude the rule in *Re Chesterfield's Trusts* (*y*). But it is more usual to add a special clause for the purpose (*z*). I have not found a decision in which the rule in *Re Chesterfield's Trusts* has been applied in the absence of an express trust for the conversion of the residue (*aa*). But there are *dicta* to the effect that equity would in such a case raise an implied trust to convert any reversionary interest comprised in the settled residue, in precisely the same fashion as it raises an implied trust to convert wasting or hazardous properties (*a*). It would therefore appear that reversionary interests comprised in settled residue are caught by the rule, whether or not there is an express trust to convert, so long as the will contains no indication that the properties comprised in the residue are to be enjoyed *in specie* (*b*). When the rule applies, and the reversion ultimately falls in or is sold, its value is taken as at the date it falls into possession or according to the net proceeds of its sale. One then calculates what sum, invested at the testator's death, and accumulating at 4 per cent. (*c*) compound interest (with yearly

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(*t*) (1883), 24 Ch. D. 643. This decision merely adopted the rule already laid down in *Beavan* v. *Beavan* (1869), 24 Ch. D. 649 n.

(*u*) See footnote (*s*), for the justification of the delay thus involved.

(*x*) The presumption is that the power to postpone sale is given as a mere power of management, ancillary to the trust for sale—not as a power (by postponing sale) to prevent the life-tenant from benefiting: *Rowlls* v. *Bebb*, [1900] 2 Ch. 107, C. A.

(*y*) *Rowlls* v. *Bebb*, *supra*. Thus a provision that the income of the residue until conversion is to go to the tenant for life implies that he is to "take the income of the residuary estate for better or for worse": *ibid.*, at p. 114, *per* Lindley, M.R.

(*z*) *E.g.*, "no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will": 2 Key & Elphinstone's Precedents in Conveyancing (14th ed.), 878.

(*aa*) In *Wright* v. *Lambert* (1877), 6 Ch. D. 649, there was no express trust for sale. But that decision came before the modern rule was formulated (*e.g.*, Bacon, V.-C., there prescribed a calculation at *simple* interest only, and only as from a year after the testator's death): see the argument in *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643, at pp. 648—651.

(*a*) *E.g.*, *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101, 112, *per* Baggallay, L.J.; but he added that any indication that the testator intended the property to be enjoyed *in specie* will exclude the implication of a trust to convert. See also *ibid.*, at p. 121, *per* Thesiger, L.J., to the same effect.

(*b*) See footnotes (*y*), (*a*), *ante*.

(*c*) At one time the assumed rate of interest was lowered to 3 per cent., in conformity with the then yield of trustee securities. But it was raised again to 4 per cent. in

rests and deducting income tax), would by now have reached this value. The sum thus supposed to have been invested is then regarded as capital; the balance represents the income attributable to it in respect of the period since the testator died. The life-tenant, or his executor after him, is thus ultimately able to claim due recompense in respect of the lean years during which the reversionary nature of the property prevented him from obtaining any benefit out of it. Until recently, it was uncertain whether the rule in *Re Chesterfield's Trusts* applies to reversionary interests in realty. *Re Woodhouse*, [1941] Ch. 332, has now decided that it does not. And this decision, be it noted, was founded upon the desirability of uniformity among the several rules which this article has attempted to describe.

SUBJECT TO CONTRACT.

By E. O. Walford, LL.D.

"The principle is clear. If in a proposed sale or lease of an estate two persons agree to all the terms and say 'We will have the terms put into form', then there is a contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, then there is no contract, because all the terms have not been settled. It comes to this: where you have a proposal made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared": *Winn* v. *Bull* (1877), 7 Ch. D. 29.

Perhaps the principle *is* clear, but its application is not a simple matter. The numerous cases which have troubled the Courts before and since *Winn* v. *Bull* was decided bear witness to this fact.

Essentials of Memorandum.

It must, however, be remembered that when the first of the two principles enunciated in *Winn* v. *Bull* is applied to arrangements for the sale of freehold or leasehold interests or for the grant of a lease there is no contract unless a complete written memorandum is to be found containing the essential terms, which are as follows:

(1) A sufficient identification or means of identification of the actual parties and of the land which is the subject-matter of the transaction: *Cohen* v. *Roche*, [1927] 1 K. B. 169; *Fay* v.

Re Baker, [1924] 2 Ch. 271 (partly because the current rates of interest had risen again, and partly in order to be consistent with the figure then employed for the rule in *Howe* v. *Dartmouth*). On the reasoning in *Re Fawcett*, [1940] Ch. 402, 407, it presumably stands at 4 per cent. still.

Miller, Wilkins & Co., [1941] Ch. 360; [1941] 2 All E. R. 18 (both as to parties); *Kennedy* v. *Lee* (1817), 3 Mer. 441; *Plant* v. *Bourne*, [1897] 2 Ch. 281 (a decision which has been criticised, but has some authority as a decision of the Court of Appeal); *Allsop* v. *Orchard*, [1923] 1 Ch. 323 (as to identity of the land).

If nothing is said in the contract as to the interest sold, it is assumed that the freehold is the subject of the sale: see *Hughes* v. *Parker* (1841), 8 M. & W. 244, and other cases cited in *Walford's Conditions of Sale*, pp. 25 and 26. The memorandum is not insufficient if it merely refers to the "vendor's [leasehold] interest" in the property. It is not necessary to resort to verbal evidence to identify such an interest, for reference to the lease itself will provide the requisite material. If, however, the memorandum relates to a *proposed* lease it is useless for the party suing on the memorandum to rely on oral evidence as to the term to be granted or the provisions which it is to contain, if the other party has merely agreed "to grant a lease" of the property without more.

(2) The price or the means of ascertaining it. We can hardly do better that repeat the following passage from *Williams on Vendor and Purchaser* (4th ed.), p. 5, footnote (*r*): "Where the parties intend that a particular piece of land shall be the subject of an agreement of sale between them, but have not determined whether the price shall be (1) a definite sum of money or (2) a sum to be ascertained in some specified manner or (3) a sum equivalent to the fair value of the land, it is thought that their agreement as to the sale rests incomplete, and does not amount to a contract legally enforceable." It is considered that there can be no sufficient memorandum if the price is not stated or ascertainable from a formula laid down in writing. And if a definite price has been fixed it must appear in the memorandum: *Elmore* v. *Kingscote* (1826), 5 B. & C. 583.

(3) If any special terms have been agreed upon, these must also appear in or be ascertainable by reference to the memorandum (*e.g.*, where in an agreement it is said that the Law Society's Conditions of Sale, 1934, are to apply); though the party suing may, in this connection, waive any term *which is in his favour* and treat the "memorandum" as complete without it.

It is, of course, elementary law that the memorandum or note of the contract in writing "signed by the party to be charged or by some other person thereunto by him lawfully authorised" may consist of several documents. And when considering whether there is a sufficient memorandum the Court must consider the whole of the written material: see *Stokes* v. *Whicher*, [1920] 1 Ch. 411. Two further points may be mentioned here, namely, that although the making of a memorandum of a proposed dealing by A may contain all the requisite terms of the offer, the other party, B, must prove the acceptance of A's offer if he is

to establish that there is a binding contract; and, on the other hand, that as the statute (L. P. A., 1925, s. 40) only requires signature by or *on behalf of* the party to be charged, a verbal acceptance by B is sufficient if B is the party suing on the contract. The recent case of *Smith-Bird* v. *Blower*, [1939] 2 All E. R. 406, aptly illustrates the second of these propositions, and also shows how briefly an effective memorandum may be worded. A note was given to the purchaser, in the following words: "Let bearer Mr. Brown have property 74 and 76 Midland Road Ellistown for £510. D. Blower."; and was followed by a confirmatory note to the vendor's solicitors instructing them to "convey the property to Mr. Brown for £510". Several interesting points were decided in this case, which is of particular interest to solicitors.

(a) The Court was satisfied that the vendor had verbally agreed with Mr. Brown for the sale to him of the property at £510, thinking that Mr. Brown was the principal, although he was in fact acting for undisclosed principals. Luxmoore, L.J. (sitting as a High Court Judge), observed that if the vendor "knew that Mr. Brown was only an agent, the memorandum, in order to comply with the statutory requirements, must either contain the names of the plaintiffs as principals or otherwise identify them". On the other hand, "if the vendor was not aware of the fact that Mr. Brown was acting as agent for anyone, but considered that Mr. Brown was contracting on his own behalf, the position is different, and the plaintiffs as undisclosed principals can rely on any sufficient memorandum in which Mr. Brown's name appears as principal, although there is no reference therein to the plaintiffs", citing as authority *Filby* v. *Hounsell*, [1896] 2 Ch. 737, and *Lovesy* v. *Palmer*, [1916] 2 Ch. 233. Luxmoore, L.J., was satisfied that the vendor was dealing with Mr. Brown as a principal. Thus, the point here raised was satisfactorily disposed of.

(b) The memorandum above mentioned, "Let bearer Mr. Brown have the property, etc." was insufficient, because it did not in terms refer to any agreement for sale. It was not addressed to anyone, and was in form a request to some unnamed person to let Mr. Brown have the property for £510. The learned Lord Justice thought that it might be that the money was to be paid by way of premium for a lease. For reasons which appear from earlier remarks in this article, considerable doubt may be felt as to the reliability of the last-mentioned thought of Luxmoore, L.J. Of course, if it had transpired that the arrangement was in fact for the grant of a lease, the terms of which had been verbally agreed, the memorandum would have been insufficient; but that is quite another matter. Here the freehold was in fact being sold. However, Luxmoore, L.J., then referred to the later letter to the vendor's solicitors (above mentioned), and stated that "this letter plainly refers to the agreement for sale of the property to Mr. Brown for £510,

and is, in my judgment, a sufficient memorandum of the agreement ".

(c) Privilege was claimed for the last-mentioned letter but that claim was not sustained. It had been doubted whether a letter to the party's own solicitor could be a sufficient memorandum (*Goodwin* v. *Fielding* (1853), 4 De G. M. & G. 90); but that doubt is now resolved.

The above remarks concerning the necessity for establishing that there is a sufficient memorandum in writing are no doubt a little wide of the special subject of this article; but it is thought that they are necessary, as in a recent case, which will be discussed later in this article, insufficient consideration was given to this aspect of the matter by the Judge of first instance, with the result that it was held that a contract was constituted where there was in fact no sufficient *signed* memorandum of the terms agreed upon.

Consensus and Signature.

One cannot over-stress the necessity for showing (a) that the parties were *ad idem* and had agreed the terms of the contract, as distinct from proving that there was a written memorandum of the terms which he was prepared to offer or accept, and also (b) that there was a memorandum of those terms signed by the party to be charged before action brought: *Bill* v. *Bament* (1841), 9 M. & W. 36. It would take us too far from the course which we have set to consider the technical meaning of " signed ", but it may be useful to mention that even pleadings of " the party to be charged " may constitute a sufficient memorandum. Thus A agreed to sell a freehold property to B, but no sufficient memorandum was signed by B. A then agreed in writing to sell the same property to C but did not perform the contract. C then sued A for specific performance. A, by her defence, signed by counsel, pleaded the contract with B in terms which constituted a sufficient memorandum. C then added B as a defendant to this action and B thereupon counterclaimed for specific performance. Obviously the last thing which A or his counsel intended to do was to create an effective memorandum which would enable B to enforce his previously unenforceable contract. It was, however, held that counsel, being the authorised agent of A to sign the pleading and to plead the contract with B, had brought into existence a sufficient memorandum before B had become a party to the action, with the result that B was entitled to specific performance, and C's action for specific performance failed: *Grindell* v. *Bass*, [1920] 2 Ch. 487.

Subject to Contract.

If A agrees to buy a freehold or leasehold property, or to take a lease, " subject to a formal contract ", it is clear that no contract can arise until the formal contract has been signed: *Rossdale* v. *Denny*, [1921] 1 Ch. 57; *Winn* v. *Bull*, *supra*; *Chillingworth* v. *Esche*, [1924] 1 Ch. 97.

It was said in *Coope* v. *Ridout*, [1921] 1 Ch. 291, that an offer " subject to title and contract " meant subject to the preparation and

execution of a formal contract. No doubt, "execution" means only "signature". However, the "execution" of a contract is not the same as the exchange of a contract (though it will be remembered that there can be no contract unless there is both an offer and an acceptance). First, it may be said that an acceptance "subject to contract" has been held to mean "subject to the execution by the parties of a formal contract": *Wilson* v. *Balfour* (1929), 45 T. L. R. 625. Secondly, it may be said that the "obvious" meaning of "subject to contract" is not "subject to the agreement of a form of contract", but "subject to the making (or coming into existence) of a contract", which involves more than the coming together of the minds of the parties. They may well have agreed, personally or through their solicitors with their approval, upon the form which the contract is to take, but it is submitted that this is insufficient to constitute a contract in such a case, and that signature by the party to be charged or his agent is necessary. It may be that there is no binding contract until actual exchange. The writer has not, however, in mind any case which actually covers this last point conclusively (*a*). The position is, however, clearer where there is a complete verbal agreement not "subject to contract" (or "formal contract"), and negotiations for a formal agreement take place and result in a verbal agreement followed by the signature by the "party to be charged" of a document amounting to a sufficient "memorandum", but there is no exchange of documents in the form agreed. Thus, in *Horner* v. *Walker*, [1923] 2 Ch. 218, it had been arranged that the lessee's solicitors (who had agreed with the lessor the draft lease) should engross both lease and counterpart. Having done so they sent to the lessor's solicitors, by mistake, the counterpart for execution by the lessor. The lessor's solicitors handed the counterpart to the lessee who personally delivered the engrossment of the lease to the lessor. Held:

(1) That the letter of the lessee's solicitors purporting to enclose the form of lease, coupled with the delivery of the lease to the lessor, brought into being a sufficient memorandum, the lessee having ratified his solicitors' act.

(2) That the lessor was entitled to specific performance in the terms of the engrossed draft.

Further, if a solicitor or his clerk makes alterations in an engrossment of a contract signed by his client A, and exchanges the agreement, and A ratifies what has been done, A cannot thereafter plead the Statute of Frauds, for the effect of ratification is to make the written agreement effective from the time when it was signed, in accordance with the normal rule which gives retrospective force to ratification: *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314.

(*a*) It is not thought that the *dicta*, such as the *dictum* of Bankes, L.J., in *Keppel* v. *Wheeler*, [1927] 1 K. B. 577, are conclusive. There Bankes, L.J., said that it is well established that where a person accepts an offer subject to contract it means that the matter remains in negotiation until a formal contract is settled, and the formal contracts exchanged. Whether the word "exchanged" in this passage should be "signed" is not too clear; and cf. *per* Lawrence, L.J., in *Raingold* v. *Bromley*, [1931] 2 Ch. 307, at p. 316, where "subject to . . . a lease executed by the lessor" is misleading, for execution by the lessor does not necessarily bind the other party.

Contract to be Put into Legal Form.

We have considered the case where the agreement is expressed to be *subject* to contract or formal contract, and although the old case of *Winn* v. *Bull*, *supra*, is reinforced by the more modern case of *Chillingworth* v. *Esche*, [1924] 1 Ch. 97 (C. A.), it has never been seriously in doubt, though variations of that phrase have led to litigation.

In the *Chillingworth Case* there was an agreement for the sale and purchase of freehold property " subject to a proper contract to be prepared by the vendor's solicitors ". The vendor's solicitors prepared the contract, it was approved by the purchaser's solicitor, and the vendor signed a copy. The purchaser did not sign it, and refused to proceed with the negotiations. The Court of Appeal held that there could be no binding contract until the formal contract had been signed, though it is not clear that exchange was necessary.

Having regard to the authority last cited it should not have been difficult to determine the effect of an agreement " subject to the terms of a formal agreement to be prepared by " the lessor's solicitors, though Atkinson, J., in *Spottiswoode, Ballantyne & Co., Ltd.* v. *Doreen Appliances, Ltd. and Another*, [1942] 2 All E. R. 65, appears to have considered that something short of signature of the requisite formal contract by the party to be charged was sufficient. It is therefore worth while to consider the facts, which were as follows: A, by letter to the lessor's agents, offered to take a tenancy of certain premises. The lessor's agents replied to the effect that the lessor was prepared to proceed subject to references and to the terms of a formal agreement to be prepared by the lessor's solicitors.

The agents also offered A possession upon his paying a quarter's rent, provided that he undertook to give up possession if no agreement was entered into. A paid the quarter's rent, took possession and installed equipment. After the lessor's solicitors had prepared the draft agreement A's representative verbally agreed to accept it. Presumably that representative was duly authorised, but that point did not arise. However, the lessor then refused to proceed. If the tenancy agreement had been signed by the lessor in the form in which it had been verbally agreed, perhaps A might have been able to establish that there was a sufficient memorandum of the contract: see *Raingold* v. *Bromley*, [1931] 2 Ch. 307, and a sufficient compliance with the condition concerning a formal agreement: *ibid.*; and see *Berry, Ltd.* v. *Brighton, etc., Building Society*, [1939] 3 All E. R. 217, following *Raingold* v. *Bromley*, *supra*.

However, Atkinson, J., held that the verbal agreement was sufficient. There is no doubt that if his decision had not been reversed it would have been in direct conflict with many other decisions of the Court of Appeal and of the High Court. It was, however, reversed unanimously by the Court of Appeal: *Spottiswoode, Ballantyne & Co., Ltd.* v. *Doreen Appliances, Ltd. and Another*, [1942] 2 All E. R. 65.

There is one further class of case which remains to be mentioned, but concerning which very few useful observations can be made. We

refer to the type of case mentioned by Parker, J., in *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284, at p. 288. His Lordship referred to cases in which the writings relied upon contemplated the execution of a further contract between the parties, and observed that it was a question of construction whether the execution of the further contract was a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, go through.

In the first case there is no contract, but in the second case there is a binding bargain, for the parties are merely saying "That is a bargain, and we will get it put into legal language by a lawyer"; cf. the words of Lord Hatherley in *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124. In such a case the result must clearly be that neither party can require that anything should be put in the formal document which goes beyond the mere interpolation of the bargain. In other words, the formal document will merely state in legal language what the parties have agreed.

One may readily select another illustration of such a case, *e.g.*, where the lessor or lessee, vendor or purchaser says, "I accept your offer. I will ask my lawyer to send you a formal contract". What one has to determine from the correspondence—*i.e.*, the whole of the correspondence —is whether the reference to a formal contract amounts to a requirement of a formal contract or merely a suggestion that the matter should be put into more formal shape, following *complete* agreement of the terms.

In the case last given there is, according to a number of decisions, a binding contract: *Fowle* v. *Freeman* (1804), 9 Ves. 351; *Rossiter* v. *Miller*, *supra*; *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70; *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295; *Gray* v. *Smith* (1889), 43 Ch. D. 208 (where the parties only intended the agreement to be a rough draft); *Lewis* v. *Brass* (1877), 3 Q. B. D. 667.

But the position is not too clear, and it does not seem to be possible fully to reconcile all the decisions. Thus if A writes to B stating "I now accept your offer and hand you conditions of sale" there is no contract: *Crossley* v. *Maycock*, L. R. 18 Eq. 180; *Smith* v. *Webster*, 3 Ch. D. 49. No doubt the answer here is that the vendor must have intended that the contract to be entered into should be in the form, containing special conditions, which he had sent to the purchaser. But *Hucklesby* v. *Hook* (1900), 82 L. T. 117, is more difficult, for there it was said, where A agreed to buy at a certain figure, and asked the vendor to get his solicitor to forward the contract, that there was no binding contract. If there is a contract where the vendor accepts and says that his solicitor will forward the contract, it is hard to see why there should be no contract where the purchaser accepts and requests that the vendor's solicitor should forward the contract.

We must, no doubt, accept the proposition laid down in *Bonnewell* v. *Jenkins*, *supra*, that it is settled law that the mere *reference*, in letters making a contract, to a future formal contract will not prevent those letters from constituting a binding bargain. On the other hand, if it is found that either party has made it a condition or requirement that there should be a formal contract, that condition or requirement cannot

be ignored, and there can be no binding agreement until the formal contract is signed. This question must be solved in each case by construing the letters which have passed between the parties, and slight variations of wording may make all the difference between a complete and an incomplete agreement. In *Chinnock* v. *Ely* (1865), 4 De G. J. & Sm. 638, where the circumstances were rather special, the vendor's solicitor wrote to the purchaser stating that he was instructed to proceed with the sale and that the draft contract was being prepared. It was held that, whatever "proceed with the sale" meant, the intimation that a form of *draft* contract was being submitted prevented the communication from constituting a memorandum of a binding contract.

Where a party relies upon a document as a memorandum of the bargain, he must take the memorandum as he finds it. He cannot, apparently, adopt as the bargain half of it, and give evidence that the other half is incorrect. "It is necessary that the letter or other document relied on should be consistent with the parol agreement set up by the party relying upon it": *Dart on Vendor and Purchaser* (8th ed.) p. 215, citing *Cooper* v. *Smith* (1812), 15 East 103. Thus, a purchaser, A, may have entered into a verbal contract for the purchase of a freehold property, and may wish to set up a receipt for the deposit as an effective memorandum. If the receipt gives the requisite details as to price, parties, etc., but is followed by the words: "Draft contract to be submitted to the purchaser [or purchaser's solicitors] for approval", the purchaser is in difficulty, though, as we shall see, it is possible that circumstances may exist in which the purchaser could succeed in obtaining the rectification of the form of receipt and specific performance of the contract as rectified.

Rectification.

In *Craddock Bros.* v. *Hunt*, [1923] 2 Ch. 136 (C. A.), Younger, L.J., in a dissentient judgment considered that there could be no specific performance of a contract with a parol variation if thereby the Statute of Frauds would be infringed. This doubt was, however, resolved by the opinion of the Judicial Committee in *United States of America* v. *Motor Trucks, Ltd.*, [1924] A. C. 196, where it was laid down (approving the majority decision in the *Craddock Bros. Case, supra*), that the Court can give dual relief by (1) reforming (*i.e.*, rectifying) the contract and (2) simultaneously decreeing specific performance of the reformed contract, the jurisdiction of the Court to rectify a written instrument being outside the prohibition of the Statute of Frauds.

"The Statute of Frauds", said Lord Birkenhead in the case last mentioned, "is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed". Further, the power of the Court to rectify mutual mistake applies although the true agreement is not in writing.

Accordingly it was laid down in the same case:

(a) That although there must be a concluded agreement (possibly verbal) antecedent to the instrument to be rectified, yet when

it is shown that the written instrument does not correctly represent the prior agreement, either party may claim, *in spite of the Statute of Frauds*, that the written instrument does not represent the real agreement.

(b) When the written instrument is rectified there is a writing which satisfies the statute, and which can be utilised as rectified, in an action for specific performance.

It may be urged that there will be very few cases in which these rules will assist because:

(i) If an oral agreement is alleged, conflicting with a written one, the defendant (where it is solely a matter of his oath against the plaintiff's) can defeat the claim for rectification by denying that there is any mistake in the written agreement: *Mortimer* v. *Shortall* (1842), 2 Dr. & War., at p. 374; *Att.-Gen.* v. *Sitwell* (1835), 1 Y. & C. Ex. 559, at p. 583.

(ii) The person claiming rectification must establish that there was a joint intention by the contracting parties which differed from the wording of the written instrument, and a mistaken belief by both parties that the document correctly represented the true bargain.

There is force in such arguments, and the present writer was much troubled by the statement in *Pollock on Contract* (10th ed.) at p. 518 that "the Court will not act on 'oath against oath', meaning thereby the oral and unconfirmed testimony of a plaintiff against a defendant who positively contradicts him", supported as it is by a *dictum* of Lord St. Leonards in *Mortimer* v. *Shortall*, *supra*, that "where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears to be without a remedy". This statement and *dictum* appeared, however, to conflict with such cases as *Craddock Bros.* v. *Hunt*, [1923] 2 Ch. 136; *Garrard* v. *Frankel* (1862), 30 Beav. 445; and the very old cases of *Pitcairn* v. *Ogbourne* (1751), 2 Ves. Sen., at p. 379. It was therefore satisfactory to find confirmation of the view that the observation in *Pollock on Contract* and the *dictum* above quoted are mistaken. As is pointed out in *Williams on Vendor and Purchaser* (4th ed.), at p. 777, the weight of authority is against the rule suggested, and it cannot be upheld. No doubt the confirmatory parol evidence must be quite clear and definite; but that is quite another matter.

It is not difficult to furnish an example of a case in which the doctrine laid down in *United States of America* v. *Motor Trucks, Ltd.*, *supra*, might assist a purchaser. Thus A instructs an agent to offer for sale his freehold property Blackacre at the price of £1,000. B calls at the agent's office and is willing to purchase Blackacre, but will only give £900 and wishes to make certain arrangements as to the fittings or the like. The agent allows him to speak to the vendor on the telephone, and the vendor agrees to take £900 and also agrees to the other points mentioned by B, who then asks "Can we regard that as settled?" A replies in the affirmative. The agent then speaks to A who confirms the arrangement. The agent then informs A that he will ask B for a

deposit which B pays, receiving a receipt which is so worded as to constitute a complete memorandum of the contract, but contains the words "subject to contract". Neither A nor B has said anything about a written or "formal" contract. B does not observe the words "subject to contract". Shortly afterwards A decides not to proceed with the sale and purports to break off "the negotiations". B examines the receipt and finds that it contains the words "subject to contract". He approaches the agent who admits that he had no instructions to add those words, but did so because this was the usual practice of estate agents. If B can rely upon confirmation by the agent at the hearing of the facts as above stated, and is satisfied that his own and the agent's evidence will be accepted even if A denies it and asserts that he only agreed to sell subject to contract, then B may hope to succeed in an action for rectification and specific performance of the agreement as rectified, provided that he can bridge one further river, which may yet prove wide and deep enough to drown his hopes. It is in fact a river of doubt with two tributaries.

(1) Had the agent authority to sign a receipt.

(2) Had the agent authority to create an effective memorandum of the agreement.

As to (1), it seems reasonably clear that if an agent is authorised to accept a given price, he is acting in conformity with general custom if he asks the purchaser to pay a deposit. It does not seem unreasonable to conclude that an agent who does take a deposit in such circumstances and gives a receipt for it has implied authority to do so. It is, however, possible that the vendor may have instructed the agent that he is not to ask for a deposit, and in that case if the agent issues a receipt which contains all the necessary particulars of the sale, the purchaser will be unable to avail himself of the "memorandum" thus produced, because the agent when making and signing the memorandum did not do so as the agent "thereunto lawfully authorised" by the vendor.

As to (2) above it is not a question whether the vendor intended, when the receipt was made out, that it should be a binding memorandum of the bargain (*i.e.*, should close the escape hatch which the statute had left open). The question is simply whether the vendor intended that the agent should embody in the receipt the details inserted by him (except the words "subject to contract") and sign it.

SUMMARY.

A short note of cases in which certain usual phrases have been employed by the parties and of the effect of such phrases may be useful before we conclude this article.

(1) *No binding contract.*

Where the following phrases are used:

(a) "Subject to contract" (or "formal contract"): *Chillingworth* v. *Esche*, [1924] 1 Ch. 97.

(b) " Subject to preparation of a formal contract ": *Rossdale* v. *Denny*, [1921] 1 Ch. 57.

(c) " Subject to suitable arrangements being arranged between your solicitors and mine ": *Lockett* v. *Norman-Wright*, [1925] 1 Ch. 56.

(d) " Subject to the terms of a lease " or " subject to a lease to be drawn up by our (or our client's) solicitors ": *Berry, Ltd.* v. *Brighton and Sussex Building Society*, [1939] 3 All E. R. 217; *Raingold* v. *Bromley*, [1931] 2 Ch. 307; *Spottiswoode, Ballantyne & Co.* v. *Doreen Appliances, Ltd.*, [1942] 2 All E. R. 65; *Chillingworth* v. *Esche*, *supra*.

(e) " Subject to surveyor's report ": *Marks* v. *Board* (1930), 46 T. L. R. 424, although written confirmation that such report was satisfactory would presumably clinch the contract.

And see also the cases summarised in *Williams on Vendor and Purchaser* (4th ed.), p. 19, footnote (*v*).

(2) *Binding contract.*

Some of the cases mentioned below are old, and it is fair to say that several of the older decisions are extremely difficult to reconcile with modern *dicta* and decisions: see and compare *Chipperfield* v. *Carter* (1895), 72 L. T. 487; *Fowle* v. *Freeman* (1804), 9 Ves. 351; *Goodall* v. *Harding* (1885), 52 L. T. 127; and *Gray* v. *Smith* (1889), 43 Ch. D. 208.

In the following cases it was held that there was a binding contract:

(a) A accepts B's offer without qualification, adding that he will arrange for his solicitor to send B the agreement for purchase: *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124. This falls into the group of cases in which the parties have made their bargain, and only intend that the matter shall be put into due legal form (or so it is said); and see *Lewis* v. *Brass* (1877), 3 Q. B. D. 667; *Vale of Neath, etc., Co.* v. *Furness* (1876), 45 L. J. Ch. 276; *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70. On the other hand, if the purchaser accepts the vendor's offer, and asks the vendor to instruct his solicitor to forward the contract, it has been suggested that there is no contract (*per* Buckley, J., in *Hucklesby* v. *Hook* (1900), 82 L. T. 117). If this is so it would seem that what is sauce for the vendor is not sauce for the purchaser. It is, however, very difficult to compare one case with another by selecting only one phrase or one letter. The whole of the correspondence must be considered in order to determine whether the parties had come to a complete agreement, or intended that further details should be settled by a further written agreement: cf. Lord Cairns' observations in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas., at p. 316. The *obiter* in *Hucklesby* v. *Hook*, *supra*, cannot be " written off " as bad law, for in *Goodall* v. *Harding* (1885), 52 L. T. 127, the purchaser not only asked the vendor to send him the contract, but also added " and I will get it signed ", and it was held that there was no contract.

(b) "Subject to the contract as agreed": *Filby* v. *Hounsell*, [1896] 2 Ch. 737. But note that this means simply "subject to the terms set out in the form of contract which we have already agreed", and does not refer to a contract to be prepared later.

(c) "Subject to the —— Conditions of Sale" (*e.g.*, the National Conditions or the Law Society's Conditions of Sale): *Pickles* v. *Sutcliffe*, [1902] W. N. 200.

(d) "Subject to the usual public house contract", provided that it appears that there is a known form of contract which answers to this description: *Lucas* v. *Hill*, [1899] W. N. 92.

It might be thought that in the following circumstances a contract is created; but the Judicial Committee held otherwise. A sends a telegram to B which runs "Will you sell me Black Cottage? Telegraph lowest cash price—answer paid"; B replies, "Lowest price for Black Cottage £900". There is no contract if A then wires "I accept your offer", or "I agree to buy at £900": *Harvey* v. *Facey*, [1893] A. C. 552. This decision has been heavily criticised (*e.g.*, 1 Canada Bar Review, May, 1923); but there is a good deal to be said in favour of it. It is not splitting hairs to point out that the owner did not reply, "Yes: lowest price £900", in which case there would no doubt have been an open offer which A might have accepted. It certainly appears to the present writer that B could not properly be understood to say, "I am quite prepared to sell Black Cottage without imposing any conditions whatever and I am prepared to complete the sale with all reasonable speed". Notwithstanding *dicta* which suggest the contrary, the test should always be: "Are the words which the party has used equally compatible with an intention to make a definite offer (or acceptance) and a mere intention to negotiate, or to continue negotiations?" If so, there is no contract. And it may be assumed that the Courts will strain against any attempt by an angling purchaser or vendor to snatch the fish by striking when the other party is merely nibbling at the bait, and has not decided to swallow it.

Purchase of Existing Leases.

The case of *Chipperfield* v. *Carter* (1895), 72 L. T. 487, which might well have been considered to be defunct (along with *North* v. *Percival*, [1898] 2 Ch. 128) since the decision of the Court of Appeal in *Rossdale* v. *Denny*, [1921] 1 Ch. 57, has nevertheless been referred to in two fairly recent cases. We have already referred to one of them, namely, the *Spottiswoode, Ballantyne & Co. Case*, in which Atkinson, J., placed reliance on the *dicta* in the *Chipperfield Case*, his decision being reversed by the Court of Appeal, whose failure to mention that case is perhaps significant. The *Chipperfield Case* was also referred to by Farwell, J., in *Caney* v. *Leith*, [1937] 2 All E. R. 532. In the last-mentioned case Farwell, J., had to consider the effect of an agreement for the assignment of an existing lease "subject to the purchaser's solicitor approving the lease". It may be asked whether, where A agrees with B to take from B a new lease "subject to my solicitor approving the proposed lease"

there is a conditional contract which will become absolute upon the approval of the draft lease by A's solicitor; but the case of *Winn* v. *Bull*, mentioned at the commencement of this article, shows that there is no contract until the form of the contemplated lease is agreed upon. The formulation of that lease is an essential part of the contract which is contemplated, and it may contain additional terms. The earliest stage at which a contract can exist is the stage at which the parties have agreed the form of the lease: see *Lockett* v. *Norman-Wright*, *supra*, at p. 61. The earliest stage at which an enforceable contract can exist (apart from "part performance") is when there comes into existence a written memorandum which satisfies the statute. Even at that stage there must be complete agreement as to the form of the lease, and if only one party has signed such memorandum, he is the only party against whom proceedings for specific performance can successfully be taken.

In *Chipperfield* v. *Carter*, *supra* (which Farwell, J., cited in the case of *Caney* v. *Leith*, *supra*), Wright, J., considered that where A offered to take a lease of certain houses, "such lease to be approved in the customary way by my solicitor", there was a binding contract, the proposed lessee's solicitor being only entitled to see that nothing irregular or unusual was inserted in the lease.

Now, it is not denied that there may be a binding contract where two parties enter into an agreement for a lease, such agreement containing all the essential terms necessary to satisfy the Statute of Frauds (now section 40 of the L. P. A., 1925), and stating that the lease is to contain the usual covenants and provisions, because it is considered that the maxim *id certum est quod certum reddi potest* applies, and that the Court can ascertain what are "the usual covenants" in such circumstances. That, however, is a very different case from *Chipperfield* v. *Carter*, *supra* (also a case of an agreement for the grant of a new lease), and it is submitted that the distinction which Wright, J., took between "subject to the lease being approved by a solicitor" (where apparently he thought that there would be no contract) and "such lease to be approved in the customary way by my solicitor" (where he considered that there was a contract) was mistaken, and it is further submitted that in neither of those two cases does a binding contract exist. Farwell, J., in *Caney* v. *Leith* appears, however, to have accepted the view of Wright, J., though the case with which Farwell, J., was dealing was one in which the arrangement was for the assignment of an existing lease "subject to the purchaser's solicitor approving the lease", and his actual decision was that in the absence of bad faith or ridiculous objections on the part of the purchaser's solicitor there could be no enforceable contract. He thought that it was not for the Court to consider and hear evidence from the solicitors as to their view, but that the Court must consider the lease itself. It would, however, be unwise for the purchaser's solicitor to refrain from drawing attention, by counsel, to any substantial objections which may be made to the terms of the lease; for it would be very unfortunate if the learned Judge should mistakenly consider that the lease was entirely unobjectionable in all respects. And

if Farwell, J.'s, observations are taken literally it would seem that the Court may now set its opinion against that of the purchaser's solicitor and may say to the purchaser in effect, "You have made a contract under which your solicitor (acting honestly) was to be entitled to exercise his judgment as he thought fit, and although he might be mistaken in the view which he took as to the desirability of accepting a lease containing the terms which this lease in fact contains, you imagined that you would be free to accept his advice, and not be involved in litigation, provided that your solicitor acted honestly. You are mistaken, for this Court may say that your solicitor is honest and sane, but has ridiculous views (or, if he has given no reasons, 'must have ridiculous ideas') because this Court considers that they are unreasonable (or, if the solicitor has given no reasons, 'because this Court thinks that no reasonable person could object to this lease', though we have no idea what his objections are, and are not concerned to inquire)".

Is it also to be assumed that if the Court of Appeal, or the House of Lords, should consider that the lease did not attain that pinkness of perfection attributed to it by the Court of first instance, a word of sympathy would be vouchsafed to client and solicitor alike?

The position is not put in this rather blunt fashion with the object of showing any disrespect to the High Court or its Judges, but solely with the object of drawing attention to the impracticability of introducing the question of sweet reasonableness in this connection. It is not suggested that Farwell, J., desired that anyone reading his observations should understand them in the sense indicated above. No doubt what his Lordship meant was that there might be cases in which it appeared that the purchaser's solicitor, though acting honestly, had obviously mistaken the law or the facts or made some other quite obvious mistake, so that his objection could not be taken seriously, and in that event it might be possible to hold the purchaser to his bargain, excluding the condition which he had made. Apparently Farwell, J., considered that the purchaser would be bound in such circumstances; but the passages to which he referred as authority for that view dealt with a different point, being cases in which a contract had been made subject to approval of *the title*. It is submitted that the question whether a perfect title is shown is a matter into which a Court may inquire with some expectation of deciding the point conclusively, and that it should not normally be difficult for the Court to determine whether any possible objection might be made to the title, for the question of title or no title is not a matter of conjecture, but is susceptible of determination by reference to statute law and judicial decisions. But it is not possible to determine by reference to the law or to any known and certain standard whether a solicitor is acting reasonably if he says to his client: "I cannot advise you to take over this lease", and if he gives reasons, is it to depend on his ingenuity or lack of it, or possibly upon his lack of knowledge of his client's intentions, or even of the law, whether there is or is not a contract? It is clear that an agreement for lease subject to the approval by the proposed lessee's solicitor of the form of lease is no contract; but it is not so clear whether an agreement to take an

assignment of an existing lease is a conditional contract (or no contract), if the agreement is subject to the approval by the purchaser's solicitor of the lease. In practice, this question is often of academic interest only, (1) because there are very few leases which are beyond objection (*i.e.*, upon some ground which is not entirely frivolous); (2) because there would appear to be no means by which the purchaser's solicitor could be required to divulge his reasons for objecting to the lease. It does not appear to be settled whether the purchaser would, by refusing to proceed or to appoint or instruct a solicitor, incur any, and if so what liability. *Caney* v. *Leith*, *supra*, does not resolve satisfactorily any of these problems. As to the point last put it will be remembered that if A agrees to purchase at a price to be fixed by B, and B does not fix the price there is no binding contract: *Milnes* v. *Gery*, 14 Ves. 400; *Tooth* v. *Jackson* (1801), 6 Ves. 12. But if A prevents B from fixing the price he will be liable in damages: *Thomas* v. *Fredericks* (1847), 10 Q. B. 775; and in a case where the vendor refuses the agreed valuer B access, a mandatory order may be made requiring him to permit B to enter to make his valuation: *Smith* v. *Peters*, L. R. 20 Eq. 511. Accordingly, such an agreement as to valuation is not a nullity, though we have seen that a purchase subject to a satisfactory surveyor's report is not a binding contract: *Marks* v. *Board*, *supra*.

Subject to Approval of Title.

Another phrase which is doubtful in effect is " subject to the approval by my solicitor of the title ". The useful law concerning this phrase is to be found within the limits of a few cases. It must suffice here to say that judicial opinions of weight have been expressed, and that some divergence between those opinions is to be found in the cases mentioned below; but it seems to have been the general opinion that there could be no contract if the purchaser's solicitor in good faith refused to approve the title. Not until *Caney* v. *Leith*, *supra*, does it appear to have been suggested that the Court could step in and decide the question (although this question of approval of *title* had nothing to do with the question which arose in *Caney* v. *Leith*). The cases to which reference should be made are *Hudson* v. *Buck* (1877), 7 Ch. D. 683; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; *Clack* v. *Wood* (1882), 9 Q. B. D. 276; *Chipperfield* v. *Carter* (1895), 72 L. T. 487 (a very unsatisfactory case); and *Curtis Moffat, Ltd.* v. *Wheeler*, [1929] 2 Ch. 224.

Cairns, L.C., in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 317, considered that the words " subject to the title being approved by our solicitors " merely meant " subject to a good title being shown " and that if the purchaser's solicitors raised any objection to the title it could be submitted to the Court, and the Court could overrule it. This *obiter* was not accepted as correct in *Curtis Moffat, Ltd.* v. *Wheeler*, *supra*.

CORRIGENDUM.

Page 60, *ante*. *Compensation under the Compensation (Defence) Act. For* Regulation "70CA" *read* "79CA".

CORRESPONDENCE.

THE EDITOR.

DEAR SIR,

We have read with interest the precedent of the Will on p. 289 of this month's issue of *The Conveyancer and Property Lawyer* by which an estate is given to a person reported missing in the present war.

We recently had occasion to draw a will by which, on failure of a certain event, an aunt gave a share in her residuary estate to a nephew who had been reported missing. For your information we enclose herewith a copy of the clause which we inserted in the will in the hope that it may be of interest to you.

Yours faithfully,
MACKARNESS & LUNT.

The following is the form which our correspondent enclosed:—

> "If for a period of three years from the date of my death my Trustees shall in their opinion be unable to ascertain the whereabouts of the said A. B. they shall at the expiration of such period from my death treat the said A. B. as though the said A. B. had predeceased me. The decision of my Trustees under this clause shall be conclusive and bind all persons interested under this my will."

THE EDITOR.

DEAR SIR,

With reference to your precedent No. 16 in the December issue of *The Conveyancer*, where such a bequest is in favour of trustees who are strangers in blood the Estate Duty Office claim duty at 10 per cent. notwithstanding the actual beneficiary may be a child or other nearer relative.

We have recently had a case where very valuable jewellery was given to trustees being strangers in blood with the express wish that the trustees should dispose of the jewellery in accordance with a memorandum, which was to have no testamentary effect, and at 10 per cent. the duty came to a very appreciable sum.

We therefore venture to suggest that a footnote of warning to this precedent would not be amiss.

Yours faithfully,
ROBERT DAVIES & Co.

[It is essential when using the form to which our correspondent refers to bear in mind the question of legacy duty. The best course is to select as the legatees persons who will only pay duty at 1 per cent. If this is done duty will be saved even if the ultimate recipients would have been liable to pay duty at 10 per cent. if the legacy had been made direct to them.]

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Vendor and purchaser—instalments of war damage contribution—whether recoverable by the vendor.—Re Corporation of Watford and Ware, [1943] 1 All E. R. 54, carries the anomalous position of war damage contributions one stage further than *Re Jacobs & Stedman's Contract*, [1942] Ch. 450 (noted *ante*, p. 39). Again the facts are not very usual because in this case the property was to be bought by the purchaser from the corporation by a series of instalments extended over twenty-five years together with certain payments provided for in the contract to cover rates, insurance, external decoration and the costs of administration of the scheme under which it was bought. Only on completion of the instalments (due to occur in 1952) was a conveyance to be executed in favour of the purchaser. The purchaser claimed a declaration that he was not liable to pay the instalments of war damage contribution. Simonds, J., held that he was entitled to the declaration. The learned Judge said that the right to recover instalments paid by the vendor could arise only in one of three cases: "it must be provided by the statute or it must be provided by the contract or it must arise under some general principle of equity". He then disposed separately of each of those heads. He pointed out that it was significant that though the Act provided for many things, including that a vendor should hold a value payment on trust for the purchaser, it did not provide for recoupment by the purchaser of the vendor for a contribution. There was nothing in the contract to cover this case and *Re Jacobs & Stedman's Contract* (*supra*) decided that there was no ground for apportionment under the heading of "outgoings" under the Law Society's General Conditions.

In deciding that there was no general equity entitling the vendor to recoupment his Lordship had some pertinent observations to offer on the rule commonly stated that between contract and conveyance the property belongs to the purchaser in equity. He said (at p. 56): "So it does; and the vendor is, therefore, during that time constructively a trustee for him [the purchaser]; but this statement must not be pressed too far, so as to give to the vendor all the rights of indemnity to which a trustee in the full sense is entitled from his trust estate, for the vendor has his own personal and substantial interest in the property, which he is entitled to protect, and it is, in my judgment, impossible to concede to him in respect of payments made by him, whether voluntarily or compulsorily as this payment was made, the right of indemnity which an ordinary trustee can claim. It is a payment which might in certain circumstances enure for his own benefit, as, for example, if the purchaser made default in completion and the contract was rescinded."

This last point is of general importance. It re-emphasises the rather unfortunate classification of the rights of vendor and purchaser as one of

constructive trusts. Both from the angle of the purchaser and of the vendor this trust bears so little similarity in many respects to an ordinary trust that the classification is misleading. The relationship of vendor and purchaser is really *sui generis* arising largely from the right to specific performance. This is a true right *in personam* not analogous to the rights of a *cestui que trust* that, despite Maitland's view to the contrary, belong essentially to the category of rights *in rem*. Consequently, to draw analogies from one class to the other is both dangerous and unsatisfactory. The only way in which a true picture of the relationship of vendor and purchaser can be obtained is by examining the rights and obligations of each, not excluding the cases in which a decree for specific performance will be refused. So, for example, a purchaser must pay the full purchase price for premises destroyed by fire and cannot complain if the vendor has failed to insure, but if the property is blown up by bombs the vendor holds a value payment on trust and if he has insured and the property is burned down he holds any policy moneys on trust for the purchaser: Law of Property Act, 1925, s. 47, but on the other hand if the vendor has to pay war damage contributions he cannot recover these from the purchaser. There is no sort of consistency about such a relationship viewed in terms of a trust, though it may amount to practical good sense if you have that kind of good sense.

This case also emphasises another point. The vendor here could not reasonably in 1927 have been expected to foresee the war damage contribution. It is, indeed, unusual for a contract for sale to operate beyond a month or two though all practitioners must be familiar with technical grounds which often delay completion long beyond the date fixed. What, however, is important is that we must expect more and various impositions on land due to planning and other action of the uncertain future. It is, therefore, time to overhaul the system by which practitioners consistently employ and rely upon General Conditions of Sale framed for other times. Some new clauses are demanded if common fairness is to be done between vendor and purchaser. Emergency regulations, such as requisition, and emergency statutes, such as the War Damage Act, may not have come to stay, but it is undue optimism to assume that they will not be replaced by other rights and liabilities that may impose burdens or alter the character of the rights between contract and completion.

(1 K. & E., p. 337, n. (*o*).)

Mortgage—right to redeem—option to purchase exercised by the mortgagee.—Nelson v. *Hannam & Smith*, [1942] 2 All E. R. 508 (noted *ante*, p. 98), has been overruled in the Court of Appeal: [1942] 2 All E. R. 680. The mortgagor had mortgaged his lease and on the same day assigned his option to purchase the freehold. The mortgagee exercised the option to purchase on the last day that it was available and before

the mortgagor had redeemed the lease. On offering to redeem the lease the mortgagor had claimed on payment of the amount paid under the option to redeem the freehold also, but Farwell, J., had held that he had no right to do so as the transaction was collateral to the mortgage of the lease. The Court of Appeal (Greene, M.R., and du Parcq, L.J.) overruled this decision. One point on which the mortgagee relied strongly was that the option to purchase "was dead" at the date at which the mortgagor offered to redeem the lease: that is to say, had the mortgagee not exercised it prior to the date of the offer to redeem the option to purchase would have lapsed. du Parcq, L.J., pointed out, however, that the option to purchase was not dead because it was a benefit assigned to the mortgagee and he had reaped it.

The essential feature of the decision by the Court of Appeal lies in the fact that the option to purchase was treated as part of the property mortgaged. As such the mortgagor was entitled to recover that property including the result of the exercise of the option to purchase. A collateral advantage must be collateral and not part of the mortgaged property and consequently the learned Master of the Rolls distinguished the group of cases referred to by Collins, M.R., in *Re Biss*, [1903] 2 Ch. 40. The fact that it was only an option which was mortgaged and a property which was redeemed was readily disposed of by the Master of the Rolls without reference to any authority.

There is one observation of general importance made by Greene, M.R., to which attention should be drawn. He said: "As the lease had never been assigned but had only been the subject of a legal charge, it may be the true view (it seems to me quite immaterial) that strictly speaking the only persons who could exercise the option were the mortgagors themselves." He, then, goes on to point out that had they done so they would have been bound to hold the property for the benefit of the mortgagees, but the vital point, which the learned Judge was clearly declining to answer, was whether there was a substantial difference between a charge by way of legal mortgage and a mortgage by assignment of the lease, which is of course now no longer possible.

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2. *WILL CASES.*

By R. E. Megarry.

Construction — forfeiture clause — religious or racial test — uncertainty.—It was said of *Re Samuel*, [1942] Ch. 1; 111 L. J. Ch. 6 (noted 6 *Conveyancer* (N.S.) 137), that if the House of Lords agreed with the Court of Appeal, the decision might well become the charter of religious forfeiture clauses (58 L. Q. R. 162). The House of Lords, however, has now dispelled any thoughts of a charter by reversing the decision of the Court of Appeal and holding that the forfeiture clause was void for uncertainty: *Clayton* v. *Ramsden*, [1943] 1 All E. R. 16; 112 L. J. Ch. 22; 59 T. L. R. 75. The clause in question provided for the forfeiture of

a legacy and a share of residue if the beneficiary married a person " who is not of Jewish parentage and of the Jewish faith ". In the judgment of the Court of Appeal the main emphasis was placed on the question of Jewish faith, for " of Jewish parentage " was construed as referring to the religion of the parents, and thus the validity of both limbs of the phrase turned on a matter of religion. In the House of Lords, however, the case turned on the first limb, " of Jewish parentage ". It was unanimously held that the Court of Appeal was wrong in holding that this phrase referred to the religion of the parents, and that the proper construction was to treat it as a reference to the parents' race. A testator who is capable of making it clear that the child shall be of a particular religious belief is capable of making the same stipulation clearly apply to the parents if that is his intention. Further, the primary meaning of " parentage " when coupled with a word of nationality such as " Jewish ", " English " or " French " is that of race or descent and not religion, and the testator, having defined the child's religion, would be more likely to concern himself with the child's racial descent than the religion of the parents. So construed, " of Jewish parentage " was void for uncertainty, for there was nothing to define the amount of non-Jewish blood which could flow in the veins of the parents without bringing about a forfeiture; " It cannot reasonably be supposed that the husband was to show an unbroken line of descent from the patriarch Jacob " (Lord Romer, at p. 22). " The Court or other party interested is left in complete doubt what degree of racial purity will satisfy the condition. Is it to be 100 per cent., or will 75 per cent. or 50 per cent. be sufficient? " (Lord Wright, at p. 20). The clause thus failed to satisfy the test laid down by Lord Cranworth in *Clavering* v. *Ellison* (1859), 7 H. L. C. 707; 29 L. J. Ch. 761, that a condition " must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine " (p. 725). It was also held that both limbs of the clause together formed only one condition of forfeiture, so that if one limb was void for uncertainty, the whole clause fell. It was thus immaterial that the beneficiary had married an English Wesleyan who on no possible construction could be held to have satisfied the testator's requirements.

This sufficed to dispose of the case, but some views were expressed on the validity of the phrase " of the Jewish faith ". Lord Wright agreed with the Court of Appeal in thinking that the phrase was sufficiently clear and distinct; " States of mind are capable of proof like other matters of fact: Courts of law and equity have to decide questions of fraudulent intent or the like. I do not understand that the rule in *Clavering* v. *Ellison* deals with questions of proof but solely with the clearness and distinctness of the language used in the clause " (p. 20). On the other hand, Lord Romer (with whom Lord Atkin and Lord Thankerton agreed), and, more tentatively, Lord Russell of Killowen, expressed the opinion that the phrase was too uncertain. Lord Romer referred to the test suggested by the Court of Appeal that the assertion by the person concerned that he was of the Jewish

faith would be well-nigh conclusive, and said, "I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words 'of the Jewish faith'. Until I know that, I do not know to what the evidence is to be directed" (p. 23). He then went on to point out that while some accept and observe every part of the religion, others do not accept all the tenets and are lax in the observance of some of the rules of conduct. Each of the latter might well assert that he was of the Jewish faith, yet some of the former might assert the contrary; the question is thus one of degree, and in the absence of guidance on the degree required by the testator, the condition fails for uncertainty.

Draftsmen who are called upon to produce religious forfeiture clauses should bear in mind the words of Lord Atkin: "I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear" (p. 17). Despite the views of the House of Lords, the clauses to be found in 2 K. & E., p. 858, n. (*c*), or the *Conveyancers' Year Book*, 1941, p. 186, as amended *ibid.* 1942, p. 232 would probably be effective. These were drafted to meet the decision of Morton, J., in *Re Blaiberg*, [1940] Ch. 385; 109 L. J. Ch. 166 (noted 4 *Conveyancer* (N.S.) 442), that a condition of forfeiture on marriage to a person "not of the Jewish faith" was void. In *Re Samuel* the Court of Appeal overruled this decision, but in the House of Lords Lord Russell of Killowen said that *Re Blaiberg* "though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question" (p. 19). A condition based on the race of the beneficiary's parents might well be valid if framed on similar lines.

(2 K. & E., p. 858, n. (*c*).)

Construction — home-made will — "all moneys of which I die possessed".—Although there is some difficulty in saying exactly what new principles have been established by *Perrin* v. *Morgan* (1943), 59 T. L. R. 134; [1943] 1 All E. R. 187, there is no doubt that the decision is an important one. The Court of Appeal, affirming the judgment of Farwell, J., had held that a direction in a home-made will that "all moneys of which I die possessed of shall be shared by my nephews and nieces now living" was to be construed in a strict sense and thus would not extend to investments, household effects or freeholds (*Re Morgan, Morgan* v. *Morgan*, [1942] Ch. 345; 2 All E. R. 30; noted *ante*, p. 43). This decision had been reached unwillingly, Lord Greene, M.R., observing that the rule that *prima facie* "money" was to be construed in a strict sense was "a blot upon our jurisprudence" (p. 346). The House of Lords was unanimously of the opinion that even if there were a presumption in favour of "money" being construed in the strict sense, that presumption had been rebutted in the present case, and that "all moneys" included all the net personalty of the testatrix; the hopes of

the Court of Appeal that their decision would be reversed were thus fulfilled. The reason for the decision of the House of Lords that all the residuary pure personalty was included (there were no leaseholds) was that otherwise the testatrix must have intended to leave her fourteen nephews and nieces little besides her bank balance and to die intestate as to the rest; of a total personal estate of over £33,000, only £840 was money in the strict sense. Lord Romer (with whom Lord Russell of Killowen agreed) made the further suggestion that under a gift of residuary personalty the actual division between the fourteen beneficiaries would probably be made in cash, which might be the explanation of the use of the word "moneys". Although in a suitable case "moneys" might extend to cover realty, in this case it did not, for the testatrix dealt separately with the more important freeholds, and thus "all moneys" (and not "all *remaining* moneys") did not cover the other freeholds.

Their Lordships were in agreement upon another point, namely, that the rule that "money" was *prima facie* to be construed in a strict sense had been "much misapplied" (Lord Thankerton, at p. 138). As Lord Russell observed, there had been a tendency for Courts to allow the rule to prevail over the context, yet it was settled that the rule yielded to a sufficient context, and "with this understanding I do not see why the rule, properly applied, should fail to work justice. The blot, if any, is not the rule, but its misapplication" (p. 138). Lord Romer referred to the cases in which the Court had said that the construction it had put on a will had probably defeated the testator's intention, and said that if this merely referred to suspicions that the testator did not mean what he had plainly said, all was well, but that if this meant that the Court felt prevented by some rule of construction from giving effect to what the language of the will, read in the surrounding circumstances, had convinced the Court was the true intention of the testator, the Court had misconstrued the will (p. 139). As Lord Russell said, either the Courts had misconstrued the will or they had indulged in guess-work (p. 139). "The result of your Lordships' decision," said Lord Atkin, "will be to relieve Judges in the future from the thraldom, often I think, self-imposed, of judgments in other cases believed to constrain them to give a meaning to wills which they know to be contrary to the testator's intention." In the competition for bad pre-eminence in departure from the true meanings he put *Lowe* v. *Thomas* (1854), 5 De G. M. & G. 315, first, with *Re Hodgson, Nowell* v. *Flannery*, [1936] Ch. 203; 105 L. J. Ch. 51, occupying a high place. "I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery Judge [semble, Eve, J.; *ante*, p. 86, n (*s*).], wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills, may be considerably diminished" (p. 137).

At this point unanimity vanishes. It is far from easy to epitomise the different opinions expressed on the validity of the rule that *prima facie* "money" is to be strictly construed, and it is with some diffidence that it is suggested that the varying views may be summarised thus:—

(a) That " money " must be given whichever of its various meanings the will and surrounding circumstances indicate as being intended, no provision being made for cases where this fails to solve the question (Viscount Simon and Lord Atkin).

(b) That " money " *prima facie* bears a strict legal meaning which may be displaced by a contrary intention (Lord Russell).

(c) That " money " must be given whichever of its various meanings the will and surrounding circumstances indicate as being intended; if this fails to solve the question, the word must be construed according to

(i) the strict legal meaning (Lord Romer), or

(ii) the most usual current meaning (Lord Thankerton).

Viscount Simon, with whom Lord Atkin agreed, said that in various contexts " money " might have anything from a very narrow to a very wide meaning, as may be seen by comparing " the money in my purse " with " don't marry for money ". If a word has only one natural meaning, it is right to give it that meaning unless a contrary intention is shown, but he protested against the Court adopting some " legal " meaning for " money " as opposed to a " popular " meaning, for the word has several quite usual meanings, and the proper meaning is the correct meaning in the case of the particular will. Instead of there being a presumption in favour of one particular meaning of " money ", the word must be construed in accordance with what appeared to be its meaning in the document, without any presumption that it bears one meaning rather than another (pp. 135—137).

Lord Russell pointed out that originally " money " had meant only cash in a man's possession, but that the rule had extended this meaning so as to include money not in his possession but presently due to him. The rule yielded to a context and this should be emphasised. " Beyond this I am not prepared to go. I am not prepared to abolish the rule. So long as it yields to context, it is, as I have said, a kindly rule, and, being a rule of long standing which has for many years decided the title to property other than cash in hand, it should not be disturbed. To abolish it would be a retrogressive step " (p. 139).

Lord Romer, although unable to understand why the strict meaning of " money " had not been further extended to cover stocks and shares, appears to have accepted the rule as being law. He regarded the rules of construction as a dictionary which bound all parties, including the Court, but said that this dictionary should not be resorted to until the Court was satisfied from the language of the whole will, read in the light of the surrounding circumstances, that the testator had not made his own dictionary (p. 139). Lord Thankerton's views were similar up to a point: " The paramount duty of the Court is to decide on the sense in which the particular testator used the word in the particular will, without any prior presumption as to the particular sense intended by the testator." When, however, the Court had decided that the context did not resolve the meaning to be given to " money ", it should treat the testator " as having used the word in the sense which the Court adjudges to be the more ordinary use of the word in the English language at the time at which the testator used it ". The Court

may well hold as a general rule that in a case of doubt one sense is more likely to have been intended by the testator than the others, but "I cannot agree that any such rule can become stereotyped in perpetuity". The meaning of words changes, so that, for example, since the last war, the ordinary use of "money" includes War Savings Certificates (p. 138).

A further difference of opinion was evinced on the subject of "it is more important that the law should be certain than that it should be just". Viscount Simon (with whom Lord Atkin concurred) said: "It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation. . . . As Mr. Justice Meredith, in his pungent and entertaining judgment in *In re Jennings*, ([1930] I. R. 196, at p. 200), observed, the Judiciary has waged a long fight to teach testators that 'money' means 'cash', but as the ordinary testator who makes his own will does not study the *Law Reports*, he persists in constantly using the word in a wider sense, and it is time that in such cases a 'popular' meaning prevailed over the 'legal' one" (p. 137). Lord Russell and Lord Romer, on the other hand, stressed the importance, in the interests of certainty, of not disturbing the settled rules of construction. "But they ought to be applied in a reasonable way. . . . I have noticed in some of the reported cases on wills a tendency on the part of the Court to pay more attention to the rules of construction than to the language of the testator" (Lord Romer, at p. 139). Lord Thankerton expressed no opinion on this point.

Perrin v. *Morgan* thus cannot be said to have reduced the law on this subject to a settled state, and until someone is public spirited enough to carry further litigation up to the House of Lords, this uncertainty is likely to continue. As it stands, the decision settles little except that many of the earlier decisions are not to be relied upon; it is not even of much value in settling the meaning of "money" in a will, for considerable emphasis was placed upon the unsatisfactoriness of relying on a decision upon one will in a dispute about another. However, four of the learned peers were agreed that any presumption as to the meaning of "money" was to be applied only in default of any interpretation which could claim support from the will and surrounding circumstances, instead of being applied at once and displaced only if a positive contrary intention was shown. This may well develop into an important principle of construction; whether it applies to other presumptions is not clear at present. Lord Russell said: "Let it be clear that nothing in this case affects indirectly any other of the many rules for the construction of wills" (p. 139), yet there is nothing intrinsically improbable in the principle applying to other rules about the meaning of words. Another important point was the stress laid on the need to consider not only the words of the will but also the surrounding circumstances. When seating itself in the testator's armchair "the Court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said" (Lord Romer, at p. 139), yet it can and should

look further than the will lying on the desk. The Court must consider all the relevant circumstances, including "the age and education of the testator, the nature of his property at the date of his will, his relations to the beneficiary chosen, whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these the Court must adopt what appears the most probable meaning. To decide on proven probabilities is not to guess but to adjudicate" (Lord Atkin, at p. 137).

A final reflection on *Perrin* v. *Morgan* is that in one aspect it is reminiscent of *Skelton* v. *Younghouse*, [1942] A. C. 571; 111 L. J. Ch. 185 (noted *ante*, p. 42). In that case the question was whether a testamentary option of purchase was to be presumed personal to the donee or whether it was to be presumed assignable by him. In a note at 57 L. Q. R. 17 it was said that "which view will prevail if the case goes to the House of Lords it is hard to say, but it is to be hoped that the opportunity will be taken of laying down a clear *prima facie* rule in one direction or the other so as to avoid litigation being instituted in every case where the testator has failed to give any positive indication of his intention". The House of Lords disappointed this hope by holding that there was no presumption in either direction, and in *Perrin* v. *Morgan* the House has also banished what had been regarded as a settled presumption. No doubt some presumptions have been misused, but they are often useful aids to construction, and it may be hoped that the House of Lords will not continue the reduction in their number to any great extent.

(2 K. & E., p. 819, n. (*o*).)

Construction—gift to mistress "during her widowhood".—In *Re Lynch*, *Lynch* v. *Lynch*, [1943] 1 All E. R. 168, a testator who for many years had cohabited with his niece by blood, Annie Ethel, appointed "my wife Annie Ethel Lynch" one of his executors and gave the income from his residuary estate "to my wife during her widowhood", with a gift over "after the death or remarriage of my wife". It was argued that, as in *Re Gale*, *Gale* v. *Gale*, [1941] Ch. 209; 110 L. J. Ch. 69, this was a gift for a period which could have no existence, for Annie Ethel could never be the testator's widow, but Uthwatt, J., rejected this argument. First, both the testator and his niece knew that she could never become his widow in the strict sense, and secondly, the whole scheme of the will was that a certain state of affairs should continue until the death "or remarriage" of the niece took place. This, coupled with the description of the niece in the will as the testator's wife, provided a dictionary which made it clear that "remarriage" meant "marriage", and "widowhood" the period until marriage. It was accordingly held that the niece was entitled to a life interest until she married.

The authorities on such gifts were discussed in an article published shortly before *Re Lynch* fell for decision (*ante*, p. 75: "The Widow-

hood of the Unmarried Wife"), and *Re Lynch* clearly falls into line with these authorities. Uthwatt, J., however, expressed approval of the decision in *Re Gale*, which was criticised in the article on the ground that a strict construction of "during her widowhood" imputed to the testator an intention to make a provision which was little short of fantastic. The approval of Uthwatt, J. was, however, clearly an *obiter dictum*, and the wise words once uttered by Lord Cranworth still hold good: "Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate" (*Abbott* v. *Middleton* (1858), 7 H. L. C. 68, at p. 89, cited by Lord Cairns, L.C., in *Bathurst* v. *Errington* (1877), 2 App. Cas. 698, at p. 709). As Lord Esher, M.R., once said, "When a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce" (*Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, at p. 393). It may also be noted that although the niece in *Re Lynch* was a spinster, there was apparently no repetition of the argument advanced in *Re Gale* that the provision for the mistress "during her widowhood" would continue after her marriage since otherwise it would be a restraint upon marriage; the reasons for believing this argument to be unsound are given *ante*, p. 82.

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Occupation rent-free by employee—leave of Court not required under Courts (Emergency Powers) Act for resumption of possession upon termination of employment.—By section 1 (2) of the Courts (Emergency Powers) Act, 1939, a person may not, except with the leave of the appropriate Court, proceed to exercise any remedy which is available to him by way of . . . the taking of possession of any property. In *Butcher* v. *Poole Corporation* (1943), 59 T. L. R. 56, the question arose whether this requirement applied to the case of an employee who was required to occupy a house rent free for the purpose of carrying out his duties, and whose employment had come to an end. It was held by the Court of Appeal that no leave of the Court was required for retaking possession in such a case.

Lord Greene, M.R., in giving judgment referred to the case of *Smart Bros., Ltd.* v. *Ross* (1942) 111 L. J. Ch. 250; 58 T. L. R. 353, where the House of Lords (affirming the dissenting judgment of Lord Greene, M.R., in that case: [1942] 1 Ch. 158, C. A.) had recognised that all the matters dealt with by section 1 (2) of the Courts (Emergency

Powers) Act, 1939, were in the nature of remedies for a default, and that a resumption of ownership which is not in exercise of a "remedy" available to the party "by way of" the taking of possession, is not within the section. The Court of Appeal therefore drew a distinction between the exercise of a simple right of property and the exercise of a remedy which operates to defeat or determine the interest or title of somebody else. Here the ex-employee was a mere trespasser, and the owners were simply exercising a right of property. There was no question of exercising a remedy for a default of any kind, nor any question of defeating or determining a right of somebody else, and therefore leave of the Court was not required.

(Woodfall, 24th edition, p. 12; Supplement No. 3, p. 76.)

Rent Restrictions Acts—actual possession.—A case not previously mentioned in these notes which is of some interest in connection with decontrol under the Rent Restrictions Acts is *Mouser* v. *Major*, [1941] 1 K. B. 477, C. A. Frequently the question whether premises are controlled by the pre-1939 Acts, and hence governed by a standard rent on the 1914 basis, turns upon whether the landlord at any time had "actual possession" of the whole of the dwelling-house so as to effect decontrol under section 2 of the Act of 1923. In *Mouser* v. *Major* the statutory tenant died and her step-daughter stayed on; some days later she entered into an agreement for a tenancy of the house at an increased rental. It was held by the Court of Appeal that the increase of rent was irrecoverable, because the landlord had never had "actual possession" so as to decontrol the dwelling-house.

Actually the appeal was allowed on the short ground that there was an admission that the landlord had never come into possession of the whole of the dwelling-house within section 2 (1) of the Act of 1923. The chief interest in the case lies, however, in the judgment of du Parcq, L.J., dealing (perhaps *obiter*) with the contention which was raised in the case that in the interval between the death of the statutory tenant and the grant of a new tenancy to her step-daughter, there was a period when there was no tenant and therefore the landlord was, notionally, in possession. It is true that where there is a clear case of occupation by a licensee, such occupation is in law actual possession by the landlord: *Goudge* v. *Broughton*, [1929] 1 K. B. 103, where there was occupation by a gardener. But this is a very different thing from the case of a short interval between the death of the old tenant and the grant of a new tenancy, when the prospective tenant, who has been living in the house all the time, is negotiating with the landlord for a tenancy. du Parcq, L.J., rejected the argument that the landlord had actual possession, notionally or otherwise, in such a case.

Contrast the case of *Kearns* v. *Bedford*, 50 T. L. R. 348, which was also cited. There the landlord had actual possession for some days, but then the new tenancy agreement was ante-dated to the time of expiration of the old one. Nevertheless the decontrol effected by the actual

possession was not nullified, because actual possession is a question of fact.

In *Mouser* v. *Major* it would also seem true to say (and du Parcq, L.J., thought so) that the substantial nature of the transaction was simply a change of tenancy made with the landlord's consent, which by section 2 (3) of the Act of 1923 is expressly deemed not to constitute actual possession. However, that point did not fall to be decided in view of the shorter answer to the case which the Court gave.

(Woodfall, 24th edition, p. 353.)

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4. *DEATH DUTY CASES.*

By Leonard Stein, Barrister-at-Law.

Estate duty—life policies included in settlement with provision for payment of premiums—valuation of benefit arising from cesser of premiums—Finance Act, 1894, *ss.* 2 (1) (b), 2 (1) (c), 7 (7).—In order that the questions raised may be appreciated, it is not necessary to set forth in detail the somewhat complicated facts of *Att.-Gen.* v. *Lord Davenport's Trustees*, 21 A. T. C. 297. The gist of the matter was that the deceased had transferred certain policies on his own life to trustees and had also transferred certain investments, of which the income was primarily applicable for the payment of the premiums on the policies. Subject to the provision for the payment of the premiums, the trust fund was held on trusts of such a nature that, although there were various beneficiaries, or classes of beneficiaries, who between them took the whole beneficial interest, it was not easy to point to a particular individual, or particular individuals, as the donee or donees for whose benefit the policies could be said to have been kept up.

On these facts, certain questions arose as to the construction of section 11 of the Customs and Inland Revenue Act, 1889, which is introduced into the Finance Act, 1894, by section 2 (1) (c) of that Act. By virtue of these enactments, estate duty is chargeable on policy moneys received under a policy effected by the deceased on his own life and "kept up by him for the benefit of a donee". Had the policy, in the case under notice, been "kept up by him" (the deceased) within the meaning of the statute? Wrottesley, J., held that it had. He pointed out that the scheme of the Act was to distinguish between cases in which the property represented by the policy moneys had been built up by the deceased and cases in which it had been built up by someone else. True, the deceased, in this case, had not personally paid the premiums year by year as they fell due, but, having regard to the scheme of the Act, it was—in the learned Judge's opinion—enough that he had provided out of his own resources the wherewithal for keeping up the policies and had handed it to persons who agreed to take it and use it for that purpose.

This disposed of the first point raised by the appellants. They were equally unsuccessful in their further contention that there was here no

keeping up " for the benefit of a donee " in the relevant sense. It was not disputed that " donee " could include " donees ", but it was argued that out of the " welter of trusts " which had been created there were no persons who clearly emerged as " the donees ". To this the learned Judge replied that it made no difference whether the persons beneficially interested " were one or many, or whether they were to take something immediately or on the death of the assured, or after a period, or subject to prior interests ". The policies had been transferred by the deceased to trustees for the benefit of other persons, and this was enough to satisfy the words " for the benefit of a donee ".

The third and last point which arose related to the valuation of the benefit accruing or arising, on the death of the deceased, from the cesser of an interest, *viz.*, the interest represented by the trustees' obligation under the settlement to keep up the policies out of the income of the trust fund (see section 2 (1) (b) of the 1894 Act). Section 7 (7) of the Act, in language which the learned Judge described as " most unhappy and inept ", provides that " the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . ., if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended ". On a literal reading, this language is barely comprehensible, but it has been given a conventional application in the well recognised " slice " principle. The question which the learned Judge had to decide was whether, in the case under notice, the amount of the premiums was, for the purposes of section 7 (7), to be taken to be the actual amount or that amount grossed to income tax. He held that " the income to which the interest extended " was not the actual amount payable by the trustees but the amount of trust income necessary to produce it; in other words, the " slice " must be calculated by reference to the gross equivalent of the amount of the premiums, expressed as a fraction of the gross income of the trust estate.

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5. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

(The decisions selected for notice are not necessarily the most important from the standpoint of the income tax practitioner but those most germane to the subjects with which *The Conveyancer* is primarily concerned.)

Income tax—tax-free annuities—whether provision made before September 3, 1939—Finance Act, 1941, s. 25.—In *Re Waring, Westminster Bank* v. *Awdry*, [1942] W. N. 160, certain tax-free annuities had been bequeathed by a will executed on February 11, 1939, and confirmed by a codicil made on March 8, 1939. On January 27, 1940, the testator had made a second codicil not containing a confirmatory

clause. It was held in the Court of Appeal that, for the purposes of section 25 of the Finance Act, 1941, the provision for the payment of the annuities must be taken to have been made when the testamentary disposition was executed and not at the date of the testator's death. It was further held that where a testator has made a codicil not containing a confirmatory clause, it will be immaterial, in determining the date of the provision for the annuities, that the codicil was made after September 3, 1939. The Master of the Rolls, however, observed, in his judgment, that different considerations might arise where a codicil made after September 3, 1939, confirmed an earlier will. It was with this type of case that *Re Tredgold*, [1943] 1 All E. R. 120, was concerned. The will by which the tax-free annuity was bequeathed was made before September 3, 1939. After that date the testator made a codicil. The codicil contained nothing affecting the annuity, but it ended with the words: "In all other respects I confirm such will." On a review of the authorities, Simonds, J., came to the conclusion that, the testator having inserted a confirmatory clause, the codicil must be read as a formal expression of his testamentary wishes. Accordingly, the provision for the annuity must be considered to have been made at the date of the codicil, and, this being after September 3, 1939, section 25 of the 1941 Act had no application.

Income tax—tax-free annuities—whether varied after September 3, 1939—*Finance Act*, 1941, *s.* 25.—Section 25 of the Finance Act, 1941, provides, as is well known, for the reduction of the net payment to be made in respect of a tax-free annuity to twenty twenty-ninths of the stated amount. In order that the section may apply, the provision for the annuity must have been made before September 3, 1939, and must not have been varied on or after that date. The question which arose in *Re Westrik, Public Trustee* v. *Middlesex Hospital and Another*, [1942] 2 All E. R. 544, was a short and simple one. A testator who died in 1933 had, by a will made in 1930, given certain tax-free annuities and given the residue of his estate to certain charities. In 1940 it had been agreed between the trustee and the persons beneficially interested in the estate, *viz.*, the annuitants and the charities, that, on a certain fund being set aside to answer the annuities, the remainder of the estate should be transferred forthwith to the charities. What the Court was asked to decide was whether there had been such a variation of the provision for the annuities as to exclude the operation of section 25 of the 1941 Act, so as to require the trustee to pay the annuities in full. Farwell, J., had no difficulty in answering that question in the negative. The relevant "provision" was the testamentary provision for the payment of the annuities, and that provision could not be said to have been varied in the relevant sense merely because the persons interested in the trust fund had in 1940 agreed upon an arrangement designed to enable the residuary legatees to receive part of the trust fund without waiting for the annuities to come to an end.

Income tax—tax-free annuities—" stated amount "—Finance Act, 1941, *s.* 25.—The payments with which section 25 of the Finance Act, 1941, is concerned are payments of " a stated amount free of income tax ". The questions raised in *Re Hawkins, King* v. *Hawkins*, [1943] 1 All E. R. 39, related to the construction of the words " stated amount ". A testator had directed the trustees of his will to permit his widow to reside rent free at a certain house and had further directed them, out of the rents and profits of his settled freeholds, to pay all outgoings, including the cost of repairs and insurance. Rejecting the contention that it was enough that the amount required would, in fact, be ascertainable year by year as the payments fell to be made, Farwell, J., had no difficulty in deciding that there was here no such " stated amount " as was contemplated by section 25. The testator had also directed his trustees to pay to his widow, clear of all deductions, including income tax, certain sums for the keep of such of his dogs and horses as remained in her possession, *viz.*, three shillings a week for each dog and fifteen shillings for each horse. The payments to be made by the trustees would vary from time to time according to the number of animals to be provided for, and in this sense there could be said to be no stated amount. On the other hand, there was a fixed sum per animal, and, since the aggregate amount to be found by the trustees in any week could be precisely ascertained by a simple calculation, it was held that there was in this case a provision for the payment of a stated amount within the meaning of the Act.

Surtax — charge on income — annual payments — whether income effectively alienated.—The decision in *Russell* v. *C. I. R.*, [1942] 2 All E. R. 551, is of interest to a considerable class of taxpayers, to some of whom it will come as a surprise. A father had executed, in February, 1935, a deed providing for annual payments to trustees for the benefit of his three children, then under age and living with him. The deed provided that during the minority of any of the children the trustees might apply the whole or any part of the annual payments as they should think fit for his or her maintenance or education or otherwise for his or her benefit or might pay the same to the child's parents without being concerned to see to the application thereof. The deed was revocable with the consent of any one of certain named persons. What actually happened was that every year the trustees received a cheque from the settlor for the amount of the annual payment and immediately afterwards sent the settlor a cheque for the same amount. The deed was of the type aimed at by section 21 of the Finance Act, 1936, which relates to settlements by parents in favour of minor children, and it was also—apart from this—of the type aimed at by section 38 (1) of the Finance Act, 1938, which relates to revocable covenants for annual payments. But the first two annual payments, which fell due and were made respectively in 1934–35 and 1935–36, could not be attacked under either of these enactments, and it might, therefore, have been supposed

that, so far as those years were concerned, there was no obstacle to the payments being treated by the settlor as deductions in the computation of his total income for surtax purposes. He was, however, confronted by the objection that, since the annual sums had been simply returned to the settlor by the trustees, who paid them over to him " without being concerned to see to the application thereof ", there had been no effective payment. The Special Commissioners compromised by allowing the annual sums as a deduction to the extent of the actual amount, as estimated by the settlor, of his annual expenditure on the maintenance and education of his children. When the case came before Macnaghten, J., on appeal it was conceded that it must be all or nothing—the annual sums must be either allowed or disallowed in full. The learned Judge decided in favour of disallowance, holding that, though the settlor had gone through the form of drawing cheques in favour of the trustees, there had been no effective payment, and that it was nothing to the point that the settlor had discharged his legal obligation to maintain his children.

Surtax—settled fund—accumulations continued after beneficiary has attained vested interest.—In *Hamilton-Russell's Executors* v. *C. I. R.*, [1943] 1 All E. R. 166, a fund had been settled on trusts providing for the accumulation of the income during the lifetime of the settlor. After his death the fund, together with the accumulations, was to be held in trust for the son or daughter of the settlor who, being tenant in tail by purchase of certain estates, should first attain the age of twenty-one. The settlor's eldest son, X, attained the age of twenty-one during the lifetime of his father. Being tenant in tail of the estates referred to in the settlement, he thereupon acquired a vested interest in the trust fund and the accumulations. By virtue of the rule in *Wharton* v. *Masterman*, [1895] A. C. 186, he was entitled to put an end to the accumulations of income and to demand a transfer of the trust fund, but in fact he did not exercise his rights until ten years later. He was then assessed to surtax, subject to the statutory time limit, on the footing that, from the time when he attained the age of twenty-one and became entitled to stop the accumulations, he must be deemed to have received the income of the trust fund year by year as it arose. These assessments were successfully resisted. Macnaghten, J., declined to accept the view that because X, on coming of age, became entitled to have the trust fund transferred to him, he must, for tax purposes, be treated as though he had exercised his rights, notwithstanding that he had, in fact, elected to forgo them. The learned Judge pointed out that the Revenue authorities had no equity in the matter and that there was no authority for the proposition that, where a beneficiary had not chosen to take advantage of the rule in *Wharton* v. *Masterman*, above, he must be deemed to have done so, irrespective of the facts.